EQUITY CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH-CAROLINA.

JUNE TERM, 1822.

Isaac Williams, adm'r of John Williams,
v.
John Washington, David Thompson & others,
} From Johnston.

Where there are two creditors, one of whom can obtain satisfaction only from the visible property of the debtor, and the other can subject not only that, but a special fund created for his indemnity; although a Court of Equity will compel the latter to resort to the special fund, or will subrogate the first to his right to that fund, yet the first creditor must demand this, before the latter has received satisfaction from the visible property. If he waits, he has no equity against a third creditor who obtains an assignment of the special fund.

In Equity, a surety, in respect of his liability, is regarded as a creditor, and has a right to all the privileges of one.

The bill alleged, that the Plaintiff's intestate, *John Stevens*, *Robert H. Helme* & *Ray Helme*, entered into copartnership in the year 1816. That upon the death of *Stevens*, and the Plaintiff's intestate, the copartnership was dissolved, and a bill was filed in the Court of Equity for the County of Johnston, for a settlement of the partnership accounts. That the Master reported in that suit, that the copartnership was indebted to *R. H. Helme* to the amount of $6473, 76 cents; and that it was also indebted to the State Bank of North-Carolina to the

June 1828.

Williams v. Washington and Thompson.

amount of $10139, 25 cents, and to the Bank of Newbern in the sum of $9000. That both of the debts due the Banks were, at the time of making the decree in that cause, in judgments, and that executions thereon were then levied upon the separate property of the Plaintiff's intestate, and of *Robert H. Helme*—as the business of the copartnership had resulted in a heavy loss, and *Stevens* and *Ray Helme* were unable to bear any part of that loss.

It was then charged, that in the progress of the above suit, the Plaintiff distrusting the solvency of *R. H. Helme*, an agreement had been made between them, whereby it was settled that the latter should take an assignment of certain debts due the copartnership, in satisfaction of the above sum of $6473, 76, due him, and among others, of a debt due the copartnership by *Stevens*, one of the partners, amounting to $1800. That the amount of the property so assigned, and certain property of the partnership, should be sequestered, and the amount of the debts when collected, and the proceeds of the property when sold, should be paid into the office of the Master, "and by him immediately paid to the satisfaction of said executions, as so much advanced and paid by the said *Robert H. Helme*," and that this agreement was incorporated into an interlocutory order made in the cause.

The bill then alleged, that the Plaintiff's intestate was bound as surety for *R. H. Helme* to the State Bank, in an individual debt, for the sum of $5819, upon which there was also a judgment at the time of making the above-recited agreement, and execution thereon was then levied upon the real and personal property of *R. H. Helme*.

The bill then charged, that the two Banks had refused to receive satisfaction of the above-mentioned debt, due them by the copartnership, from the fund thus created, but had elected to enforce satisfaction out of the separate and private property of *R. H. Helme*, and out of the assets in the Plaintiff's hands; and that the amount thereof had been

discharged by an execution sale of the assets in the hands of the Plaintiff, and of the visible property of *R. H. Helme*, in the proportions for which they were respectively liable, viz: one half by each. But that in consequence of the satisfaction of *R. H. Helme's* portion of the copartnership debts, from his visible property, and from the fact, that the executions thereon had a priority over that upon the individual debt of *R. H. Helme* for $5819, above mentioned, the Plaintiff had been forced to pay, as surety for the last mentioned debt, the sum of $4877, and he insisted, that had the Banks elected to receive satisfaction for the debts due by the partnership, *pro tanto*, from the fund created by the agreement, and the decree above set forth, that the visible property of *R. H. Helme*, aided by the fund thus created, would have been amply sufficient to indemnify the Plaintiff against loss, by reason of the above stated suretyship of his intestate.

The Plaintiff insisted, that he had a right to the use of the fund created by his agreement with *R. H. Helme*, to indemnify him against the loss he had sustained as surety, and charged that *Helme*, instead of assigning it to him, had assigned it to the Defendants, to secure a debt which he owed them; and that the Defendants had full notice of the equity which the Plaintiff had to the property thus assigned them.

The prayer of the bill was, that the Defendants might be decreed to be trustees of the property assigned them, for the Plaintiff, and directed to account with him, for the sum which they had received under their assignment.

The State Bank, and *R. H. Helme*, were also made Defendants; but no decree was prayed against them, the Plaintiff only praying permission to use the name of the President and Directors of the State Bank, in collecting the fund created by the decree.

A demurrer for want of equity, was filed by *Washington & Thompson*.

The cause was argued at June term, 1827, and retained under advisement until the present term.

June 1838.

Williams v. Washington and Thompson.

Seawell & Gaston, for the Defendants:

The surety in this case cannot assert a right to the fund assigned to the Defendants, on the principles of substitution, because the creditor never had a right to that fund.

It is admitted that the surety, on paying the debt, has a right to be subrogated to his creditor, to use the means, to have the assurances, and to avail himself of the remedies which the creditor possessed, to enforce payment from the principal debtor. But the creditors of the Plaintiff had no fund, no special assurance, no peculiar remedy, to which the Plaintiff can be substituted. The creditor had a judgment against *Helme*, which entitled him to receive satisfaction out of *Helme*'s property, and so far as that property extended, not being embarrassed by older executions, the surety has a right to claim that it be used for his indemnity. Certain debts due from the partnership to *Helme* individually, and also certain debts due to *John Williams & Company*, of which firm *Helme* was a large creditor, which had been assigned to *Helme*, to pay his debt, were set apart as a fund in aid of the property of *Helme* and the Plaintiff, to meet demands which the Banks had against the partnership. The sequestration of this property was a guarantee for the benefit of the Plaintiff, to secure him from paying more than his share of the copartnership debts. Had the Plaintiff paid more than his share of those debts, he might have been admitted, provided his admission did not interfere with the rights of third persons, to claim indemnity from that fund. (*Aldrich* v. *Cooper*, 8 *Ves.* 391.) The Plaintiff has paid of the copartnership debts only his proportion, and has no cause of complaint on that score. He asks however, to go a step further, beyond any that has hitherto been allowed, and demands not to have the benefit of a fund bound to pay the debt of his principal, to which his creditor had a right to resort in the first instance, but to be subrogated to the rights of another cre-

ditor, and have recourse to a fund out of which this last creditor had a right to receive satisfaction, because his, the Plaintiff's creditor, might have obtained, on a proper case, such a substitution.

The principle on which sureties are subrogated is, that the fund sought has been actually pledged for the payment of the identical debt which the surety has paid, and that it is malevolent in the creditor to throw away that fund to his injury. If this principle of substitution is extended further than it has heretofore been carried, the Court will be involved in complicated and perplexed enquiries, to which judicial tribunals are utterly incompetent. The surety asks to be substituted in the place of a creditor against one not his principal, because his creditor might have claimed to be so substituted. It will be but another step, to be substituted to the rights which his creditor's creditor might have claimed.

All cases of substitution go upon the ground that the debt paid had both a legal and equitable claim upon the fund out of which satisfaction is sought—thus where legatees or simple contract creditors come against the heir, where the personal estate has been exhausted in payment of debts which bound him—the Court gives the benefit of the fund to those who have paid the charge, which the law peculiarly laid upon that fund, and the decree carries into effect what was the result of the law, upon the transaction between the creditor and original debtor.

This fund never was liable to pay the debt which the surety has paid. The Complainant's creditor never had any demand or recourse against it, either in law or equity, as it consists of debts which were choses in action, and not liable to execution. It could not be reached even by a bill in equity, as a creditor, excepting in a case of collusion, cannot file a bill against his debtor, and his debtor's debtor. The probable reason being the difficulty of examining first the demand of the Plaintiff, and then the accounts between the Defendants. (*Emslie* v. *McAulay*, 3 *Bro. Ch.* 624.)

June 1825.

Williams v. Washington and Thompson.

II. The Plaintiff claims, because he alleges that his creditor had a right to be subrogated to the claim, which the copartnership creditors had against this fund. But the principle of substitution is that, where there are two creditors of the same debtor, the one having a demand against one estate only of the debtor, and the other against two estates of the debtor, the former has a right to confine the latter, to make good his claim against that estate which is not liable to the former, or if disappointed, may ask to succeed to the claim of the second creditor against the estate subject to him only. (*Lancy* v. *Dutchess of Athol*, 2 *Atk.* 444—*Attorney-General* v. *Tyndall*, *Ambler* 614—*Ex parte Kendall*, 17 *Ves.* 520.) But in this case the creditors are the same, and the debtors are not the same persons, but different. The equity of substitution lies between other creditors of the copartnership, and the judgment creditors for whom this fund was provided. There is no instance, no decision, and even no *dictum* to support this claim, when the debtors are different. (*Dorr* v. *Shaw*, 4 *Johns. Ch. Rep.* 17.) To ascertain this equity, enquiries of various kinds are to be resorted to, many equities investigated, which the form of the present bill will not admit of.

III. It appears upon the bill that the payment made by the Plaintiff was after the assignment to the Defendants. The equity of the Plaintiff is neither prior, nor better than that of the Defendants. It is the payment to the creditor, that constitutes the surety the equitable assignee of the creditor, and therefore subrogates him to the rights of the latter. It is not the engagement which gives him the right, but the fact that he has become a creditor, by actual payments. (*Per Kent Chancellor in Campbell* v. *Macomb*, 4 *John. Ch. Rep.* 538.)

If the sequestered debts be a fund which this Court can make liable, the Plaintiff is not entitled to relief against those who are purchasers before his equity accrued:—The maxim *qui prior est tempore, potior est jure*, being the rule.

The payment by a surety makes him only *quasi* assignee of the fund, but before his payment, it was assigned to the Defendants; *Helme* was its owner, and had every dominion over it, except where the decree restricted him, and it restricted him only as to the partnership creditors. His assignment is, of course, good against all who then had no lien upon it.

IV. The Plaintiff ought first to have established his claim against *Helme* at law, by a judgment. The demurrer admits, that the Plaintiff has paid part of the debt as surety; but this alone, does not make him a creditor. It may be that *Helme* has larger claims against him—for this reason, Equity only lends its aid to judgment creditors, otherwise the examination of legal claims is drawn from their proper forum. (*Rambaut* v. *Mayfield*, 1 *Hawks* 85. *Hendricks* v. *Robinson*, 2 *John. Ch. Rep.* 283. *Brinkerhoff* v. *Brown*, 4 *do.* 671.)

Devereux, for the Plaintiff.—It being admitted, on the other side, that the surety has a right to be subrogated to all the rights of his principal creditor, it only remains to ascertain what rights existed in the State Bank, as to the debt for which the Plaintiff was surety. From the facts of the case, it seems, that before the decree of sequestration was entered, the principal creditor had two judgments against *Helme*; one in which the Plaintiff's intestate was a co-obligor, and one in which he was a mere surety. For satisfaction of these two debts, the creditor could, as to *Helme*, and for the purposes of this discussion, look only to the visible property of *Helme*, which was then under execution. By the order of sequestration, an additional security was created as to the first mentioned debt, and which, in the language of the Counsel on the other side, guarantied the Plaintiff, from the payment of more than his proportion of that debt. It is obvious, notwithstanding the ingenuity with which the facts are stated, from the very statement of the

June 1818.

Williams v. Washington and Thompson

case, that there were two funds, and two debts, both of which funds could be subjected to the satisfaction of one debt, and only one to that of the other. The question then arises, what equity existed as to the second debt—for it is admitted we have a right to all that equity.

It is conceded by the argument on the other side, that as a general rule, in the case stated, the creditor who has recourse only to one fund, may either compel him having two, to resort to that which is not subjected to the debt of the former, or that he may be substituted in the place of the latter, as to that fund to which he has no recourse. This being the clear and conceded law of this Court, it is difficult to conceive what reason can be assigned, why the Plaintiff has no equity of this kind. The fact, that both debts are primarily due to the same person, can make no difference; for in this Court, the surety is the person owing the second. Neither can the fact, that the surety in the second debt, is a co-obligor in the first, affect his rights as surety; for as to the two debts, his situation, and of course his right, is essentially different. As to his proportion of the first, he is bound by all events; but as to the last, he is, saving his liability for it, which cannot affect him as to his present claim, entirely a disinterested person.

But it is said, that the principle on which the surety is substituted, is, that the fund sought, has been actually pledged for the payment of the identical debt which the surety has paid, and that it is malevolent in the creditor to throw away that fund. Now, premising that a surety has no greater privileges than a creditor—that is, that his *liability* gives him no greater privileges than actual payment gives another—we contend that this is not the case—that no lien, legal or equitable, is necessary to entitle any creditor to this right. Witness the case of a freehold and copyhold estate mortgaged to A, and the freehold only to B. Copyholds are not subject to the payment of debts, and yet it is the clear law of this

Court, to marshal the estates, so as to give B. the freehold unincumbered. Suppose still further, that the freehold estate is sufficient to satisfy both the mortgages, and that the personal property has been exhausted in the payment of specialty debts. The Court will give to the simple contract creditors, the right the specialty creditors had, of marshalling the debts upon the copyhold, altho' it is clear, that the specialty creditors had no lien, legal or equitable, on the copyhold. Witness also the case of the legacy not charged upon land, but the assets being exhausted in payment of bond debts, is let in *pro tanto*, upon the land. (*Aldrich* v. *Cooper*, 8 *Ves.* 382.) The principle upon which the Court acts, is entirely free from any idea of a lien, but results solely from principles of natural equity, which forbid that the rights of one creditor should be sacrificed to the whim or caprice of another. What, but whim or caprice, or a sense of their own convenience, could induce the Banks, in this case, to follow the visible property of *Helme?* That they had a right to an election, is conceded, but we claim the benefit of that election. We claim what they refuse. But independent of these reasons, which are not waived—by the terms of the order of sequestration, the fund now sought to be subjected, was pledged to the satisfaction of the copartnership debts. The money arising from it, is directed to be paid to the Clerk, and that "it shall by him, be immediately paid to the satisfaction of the said executions." An express assignment of them, as collateral security, could not make the fund more applicable to the debt—could not give the creditor a better right to say, "we will take the fund *pro tanto*, in satisfaction of our execution." To prove this, let us suppose that the Banks held a third debt against *Helme*, with the security for which they were dissatisfied—that they took the fund, and attempted to apply it to the payment of the third debt. Can it be contended that they could do so? Yet who could restrain them? *Helme* could not; for he can-

June 1828.

Williams v. Washington and Thompson.

not complain that his own property goes to pay his own debts. The Plaintiff's intestate could not, in regard to the first debt, for which he was a co-obligor, for he pays nothing but his due proportion of it. Nobody is left then to complain of this wrong, except the Plaintiff, or some creditor situated precisely as he is. (*Ex parte, Rushforth*, 10 *Ves.* 412. *Paley* v. *Feild*, 12 *do.* 435.)

I repeat, that it is difficult to show any reason, why the decree of sequestration created no equity as to the second debt. If it had been used in payment of the first debt, it would have left the property liable to execution, free to the second debt. The Banks had a right so to use it, and we only seek to be put in the situation, in which we should have stood, if it had been so used.—But it is said, that the fund now sought to be subjected, never was liable to pay the debt which the surety has paid—that the Plaintiffs' creditors, viz. the Banks, never had any recourse against it, as it consisted of debts, which are not the subject of an execution, and that it cannot be reached, even by a bill in Equity, as a bill cannot be filed against a debtor's debtor; for which is cited *Emslie* v. *McAulay* (3 *Bro. Ch.* 624.) To the first, we reply, that the very terms of the order of sequestration, give our creditor the right to the fund, and that we have a right to be substituted to him. It is, being the property of *Helme*, liable to pay all his debts, and it has been shown, that no specific lien is necessary to enable us to resort to it. It is true, that it is not such property as is liable to an execution; but it never was before contended, that this characteristic was necessary to enable a Court to marshal—on the contrary, if it was so liable, there would be a complete remedy at law. As to the proposition, that a bill cannot be filed against a debtor's debtor, it is denied—and the case cited will be found not to support it.

Again, it is said, that in all cases of substitution, there must be different creditors of the same debtor; but that

this case is that of the same creditor of two debtors.—This objection has its origin in an incorrect view of the subject. By the established rules of the Court, the Plaintiff was a creditor in respect of his liability, so there are two creditors—in Equity, and looking at the substance of the transaction, *Helme* was the real debtor, *quoad* his half of the debt due the Banks, and not the co-partnership. The cases *ex parte Kendall*, and *Dorr* v. *Shaw*, fully prove, what is conceded—that if there is no equity to affect the fund sought to be subjected, it shall not be so subjected.

Again, it is said, that if applications of this kind are allowed, the accounts will be so complex, as to render it a matter of policy to decline sustaining such bills.—I submit, that it is one of the peculiar features of a Court of Equity to give relief, when at law, the complexity of accounts renders relief impossible; and I think, that I am supported by the following cases, most of them connected with the subject now under consideration, and which proves that no accounts, which can be solved by human calculations, are considered as too difficult for the Master to act on. (*Ex parte Marshall*, 1 *Atk.* 129—*Ex parte Wildman*, *Do.* 109—*Ex parte Turner*, 3 *Ves. jun.* 243.)

But it is argued, that if the Plaintiff ever had any equity, it has been defeated by the assignment to the Defendants—that the Plaintiff had no equity until the money was paid, and that, not being paid until after the assignment to the Defendants, the equity of the latter is better. As to the first, it is submitted that if any equity ever existed in the Plaintiff, it cannot be defeated by matter *ex post facto* between *Helme* and the Defendants, especially as the bill charges and the demurrer admits the Defendants had notice, the maxim being *qui prior est tempore, potior est jure.*

But we contend that the equity of a surety arises from his liability, that in respect to this he is considered as a

June 1826.

Williams v. Washington and Thompson.

creditor—all the cases go upon this principle—for this reason he can compel the principal creditor to prove, under a commission of bankruptcy, and hold the dividends for his benefit before he has paid any thing—for this reason, after a default by the principal debtor, he can, upon indemnifying the creditor, urge him to diligence in getting security, and many other cases might be cited which go upon this principle. The *dictum* cited as from Chancellor *Kent*, in *Campbell* v. *McComb*, does not support the position, and if it did, is entirely opposed to his express decisions in *Hays* v. *Ward*, (4 *John. Ch. Rep.* 123)—*King* v. *Baldwin*, (2 *Ditto* 554)—*Cheseborough* v. *Millard*, (1 *Do.* 409)—*Stevens* v. *Cooper*, (1 *Do.* 425.)

But it is said again, that we have no right to come into equity, until we have established our claim at law.—This is unquestionably true as to mere legal demands; but the rule is different when the demand sought to be recovered is one which a Court of Equity is in the habit of ascertaining, and which may as well be done here as at law. (*Lawson* v. *White*, 1 *Cox* 276—*Dering* v. *Earl of Winchelsea*, *Ditto* 318.)

Henderson, Judge.—This certainly was once a case proper for a subrogation; two creditors—two funds—both funds accessible to the preferable creditor, and one only accessible to the other. And had an application been made at any time during this state of things, I think that there cannot be a doubt, but that the creditor disappointed of his only fund, by the creditor who had the choice of two, might take the rejected fund as his means of satisfaction, in lieu of the one thus taken from him; upon a principle of natural equity, that he who in the exercise of his own just rights, injures another, is bound to make satisfaction, if he can do it without loss to himself. But the application should have been made during the time that the power of the Bank over the fund

created by the decree, existed, as all that the Plaintiff can ask for is, to be subrogated to rights which they had when the bill was filed. No principle of equity recognized in this Court was violated by the Bank, in resorting to the fund most convenient in their estimation, for the satisfaction of their debt, and on this point, they were the sole judges. It is sufficient if the object was to secure themselves, and not to injure another. This case is also somewhat weakende from the circumstance that the property was not withdrawn from the operation of the Plaintiff's execution by means of the sequestration; but was, from its nature, never subject to it, being debts and choses in action. There was nothing therefore personal in the equity which the Plaintiff had; it consisted simply in this, to have from the Bank an assignment of this sequestered fund, upon its being ascertained that the Bank did not want it. But the Bank lost all its power over the fund when their debt was satisfied, and *Helme* was then remitted to his original rights, and most certainly, I think, had full power to transfer it to any one, *bona fide*. This it seems he has done to the Defendants *Washington* and *Thompson*. If it is argued that the Bank could not know whether they would want the fund, until it was ascertained whether the other property of *Helme* would pay their debt, and therefore such application to them would be premature, it is answered that they might be required to make a provisional assignment. As to the equity against the Defendants *Washington & Thompson*, the Plaintiff has none; they are purchasers or incumbrances for value, and in that respect equal at least in equity to a creditor, and have by the transfer acquired a specific equity to hold the property. As to the ground of subrogation on the score of the Plaintiff's having paid the debt to the Bank as the surety of *Helme*, he can, on that ground, only obtain the securities and facilities which the Bank had, in securing and collecting the debt thus paid by the surety, and not those which the Bank

June 1828.

Williams v. Washington and Thompson.

had against the debtor or any other person, or fund for securing and paying another debt.

Hall, Judge.—I am at a loss to perceive the equity that entitles the Plaintiff to a priority in interest, over *Washington* and *Thompson*. His intestate was surety for *Robert H. Helme*, for a debt upon which there was a judgment and execution against him, but there was no lien created thereby on the fund in question, neither had the creditor a lien on that fund. If they had, and could thereby have had their debts discharged, but had elected to proceed against *Helme's* property, which only was liable for the Plaintiff's debt, and which would have been applied to the Plaintiff's debt, had not the execution of the Bank been the oldest, I think in that case the Plaintiff might claim to stand in the place of the Bank, as to that fund. But it does not appear that the Bank creditors had any option. Neither they, nor the Plaintiff's intestate had any lien upon it. And if *Washington* and *Thompson* are *bona fide* creditors of *Helme*, and have got a conveyance of it in discharge of their debt, I see no reason why it should be wrested from them. For aught that appears, their claim is as well founded as that of the Plaintiff.

Per Curiam.—Let the demurrer be sustained and the bill dismissed.

JUNE 1828.

Isaac Williams, adm'r of John Williams,
v.
Robert H. Helme John Washington and David Thompson.
} From Johnston.

A surety has in respect of his liability, the rights of a creditor, and upon the insolvency of the principal debtor may retain any funds belonging to him in his hands.

Therefore where the surety owed the principal debtor, who became insolvent, and assigned for value the debt due by the surety, it was held that the latter might retain the amount of his subsequent payment against the assignee.

The Plaintiff in his bill alleged, that before the 27th of May, 1826, his intestate was bound as surety for the Defendant *Helme*, to a large amount, and was also indebted to him on that day, in the sum of $1491,33, for which suit had been brought by *Helme*, returnable to the County Court, which sat on the said 27th of May, 1826. That *Helme* was very anxious to collect the amount due on the debt of $1491,33, and the Plaintiff to prevent him, as he wished to retain that sum, as an indemnity against the suretyship of his intestate for *Helme*—that it was agreed between them that the Plaintiff should confess a judgment for the debt, with a stay of execution for three months, which was accordingly done—that on the 27th of May above mentioned, after the confession of the judgment by the Plaintiff, *Helme*, whose circumstances had been doubtful, failed, and proclaimed his insolvency—that between that time and the ensuing August Term of the County Court, executions issued against him, and the Plaintiff on a judgment which had before that time been entered up against them, whereon the Plaintiff had paid the sum of $4877,87, for which his intestate was bound, as surety for *Helme*.

The bill then charged that *Helme*, instead of satisfying the judgment for $1491,33 which the Plaintiff had confessed; by applying the amount of it, to the sum thus paid

June 1828.

Williams v. Helme et. al.

as his surety, had assigned the judgment to the Defendants *Washington & Thompson*, who were copartners, in payment of a debt due them, and that they, in the name of *Helme*, had issued an execution thereon, and were about to raise its amount, from the assets in the hands of the Plaintiff.

The prayer of the bill was for an injunction and a discovery.

All the Defendants answered, and proofs were taken, but the case made by the bill, was not materially varied. It appeared from the answer of the Defendants *Washington & Thompson*, that the assignment was made by *Helme* to them, on the 2d of June, 1826, which was before the payment of the $4877,87 by the Plaintiff.

Badger & Devereux were to have argued for the Plaintiff, but the Court called on the Counsel on the other side.

Seawell & Gaston, for the Defendants, *Washington & Thomson*, argued strenuously, that it was a mistake, to believe that sureties are entitled to any peculiar favor in a Court of Equity. They, having received no equivalent for their undertaking, are bound, or not, by the rules of law, and cannot be made liable to any greater extent, or in any other respect, than was contemplated by them when they entered into their engagements; but to the extent they *did intend*, Equity, in case of a mistake or accident, will afford the same assistance against them, that it would against him who had received a valuable consideration. A lost bond, for instance, will be set up against the surety; and, in short, he will be compelled to do every thing he undertook to do. The surety then, can, by no possibility, be said to have a higher equity than a creditor. Suppose, in this case, the intestate, *Williams*, had been a creditor of *Helme*, but that the debt was payable at a date subsequent to the assignment to *Washington & Thomson*, and that, instead of a *judgment* the assignment had been of a *note*, with notice to the as-

signees of the insolvency of *Helme*, and that he was in fact debtor to the intestate. Could equity interfere in such a case? If it be answered, that, in the case stated, the legal title passed to the assignee, which did not by the assignment of the judgment, it can be replied, that if the assignee of the legal title *had notice* of the prior equity, he is regarded as precisely in the situation of the assignor. That the matter of equity charged in this bill, would furnish no defence at law, in the case stated, I think, cannot be controverted; and if not, I ask why? The action at law is assumpsit, where every equitable defence is let in—the action is but a substitute for a bill in Equity, in which the Plaintiff can never recover against conscience; and if it be admitted, that the grounds of this bill would form no defence at law, the consequence must be, its dismissal. In reference to the case supposed, how does this case stand? *Helme* is indebted, and the intestate is his surety. There is a judgment obtained against both. The intestate is indebted to *Helme*, by judgment against his administrator. *Helme*, the principal, is indebted to the Defendants, and assigns to them this judgment, in satisfaction of the debt—it is charged in the bill, that at this time his insolvency was not only known to himself, but was a fact of general notoriety. If, instead of taking the judgment, and assigning *that*, the assignment had been of the note, the Defendant would have been protected by law and equity both. Not that he has a better conscience, or is fenced with a stronger wall—for his action at law is subject to precisely the same defence, but it is simply because the administrator could offer no objection to his action, but a *possibility* of his intestate's suffering, in virtue of his suretyship. Now it is important, not to confound the relief which a Court of Equity furnishes, as growing out of the justice and equity of the *actual state* of the case, and that interference which it extends to prevent an injury that may *possibly happen*. The first is founded upon

June 1828.

Williams v. Helme et al.

the justice which then exists; the latter arises entirely from the *fears of what may happen*. When the assignment was made, the surety had paid nothing, and tho' *Helme* was, in fact, insolvent, it was equally known to the Plaintiff, and he ought, instead of confessing judgment, to have insisted upon retaining the debt, as an indemnity, and in case of refusal, enjoined its collection. Yet he voluntarily confesses judgment, and is satisfied with a stay of execution. The Defendants, at this time, are actual *creditors*, not depending upon any contingency; they have *already advanced* their money, and receive in payment this judgment. Why should not their debt stand upon as high ground, as the responsibility of a *surety*, who *might*, or might not, be compelled to make advances? If the transfer, or collection of this judgment, had been enjoined, it is admitted, that the Defendants would not be permitted to derive any benefit by a conveyance subsequent to such injunction—not upon the ground of superior equity, but because it would have been in contempt of the order of the Court. By the assignment, they acquire a title in Equity to the money, which is older than that which the Plaintiff has; for his title to the *money* never existed, till the payment as surety.

Again, a *debt* is regarded as property, as much as any chattel: it is capable of being transferred, and can pass from hand to hand. If it is evidenced by negotiable paper, the legal title will pass to the assignee, who may sue in his own name; but in Equity, every debt will pass, upon satisfactory evidence of a disposition, whether it be negotiable at law or not, and whether with or without consideration; and for the very same reason that a chattel in possession would have passed. The judgment then, was to be regarded as so much property *belonging* to *Helme*, and to place it on the strongest grounds for the Plaintiff, in the possession of the latter, and which could be disposed of by *Helme*, precisely as any other

chattel. Suppose, instead of this debt, it had been a horse, is there any thing which could have hindered *Helme* from transferring it, in satisfaction of *Washington & Thompson's* debt? Could *Williams*, the administrator, in Equity have resisted the delivery upon the ground of his liability as a surety, and the insolvency of *Helme?* It is true, that the *result* shows, that *Helme's* estate when afterwards sold by the Sheriff, did not raise money enough to pay all his debts, and that, by *this consequence*, *Williams* was obliged to pay the amount of his suretyship; but it cannot be said, that at *that* time, *Helme owed Williams* any thing. If he did not, *Helme* had nothing in *his* possession belonging to *Williams*, which I consider as essential, to entitle *Williams* to *retain* what he had belonging to *Helme*. For the ground upon which *Williams* must resist payment to *Washington & Thompson*, is, that he has a right to retain it, in the nature of a set-off; for unless he can do this, he has no title at all. To examine a little further what has been already stated. It must be confessed, that there is no peculiar right which the Plaintiff had to retain this debt, that would not have applied with the same force to any other estate belonging to *Helme*, which might have been in his possession. Suppose, that instead of the debt, it had been a horse, and *Helme* had sold the horse to the Defendants in part payment of their debt, could there have been any defence against the title? But if it should be said, the legal title passed, which would protect the purchaser without notice—then suppose the Defendants to have notice, and how would that affect the case? To entitle the Plaintiff to retain, it is necessary for him to show a title to the *thing retained*. This is the clear rule in regard to a chattel. If the thing retained be money, as a debt, then there must be a claim against the creditor for *money;* and as there is no difference between monies of the same amount, that entitles the debtor to retain it, instead of its being paid by the creditor. But

June 1828.

Williams
v.
Helme et al.

examine it, in whatever light either subtlety or ingenuity can, this right must be bottomed upon a *title to the thing retained.* Now in the case of factors, their lien depends upon the nature of their employment, and the implied understanding of the parties, by the rules of law, and is founded exclusively upon commercial considerations. Without such a rule, no man would, or could become a factor, without the greatest peril.

But if it be said, that in a case of *actual insolvency*, the *liability* of the surety, against whom there is a judgment, affords him the right to withhold payment, I answer, it is true, that a Court of Equity, whose province it is to prevent mischief, will afford its assistance—but how far? To enjoin *perpetually*, before the surety has paid? Or will it not rather say, that he shall not reduce this debt to his possession, until he has released the surety from his thraldom? That interference of the Court does not spring from any right which the surety has to the *money*, but from the right which he has to be *protected*, against mischief that *may* befal him. The conduct of the Court is with a view of *preventing* the principal from committing a dishonest act; for it would be the height of dishonesty in a principal to collect a debt from him, and at the same time, leave him to pay as surety. This rule, it is true, exists, but only between *principal* and *surety*. The rule upon which the Court goes, is to prevent a dishonest act; but where is the dishonesty in paying one creditor, when the effect *may* be, that another is to go unpaid? Are not all creditors equally meritorious? And will a Court of Equity, when an application is made to enforce payment of a debt, not recoverable at law, say to the creditor, that all other creditors must be let in *pari passu*, and yet, if relief be given in this case, it must say further, indemnity shall be retained for him, who in *probability may* be a creditor? It is true, that where a fund is provided for the payment of *debts*, and it is necessary to resort to a Court of Equity to have the trust executed,

there all creditors come in; but for a very different reason—that is, because the fund was *provided* for *all* the debts. The Defendants are *bona fide* creditors of *Helme*, and have his assignment of this judgment, in part satisfaction of their debt, and they have the same equity to retain it, that they would have had they received so much money with notice of the Plaintiff's liability.

The assignment then was perfectly honest as respects the Defendants, and they are entitled not only to the forbearance of the Court, but to its assistance, if necessary to the full enjoyment of it. The Plaintiff has applied to this Court, to obtain its assistance in prejudice of their right. It is distinctly admitted, that having only obtained the equitable title from *Helme*, the Defendants can have none other, than he *then* could convey, and that any equity which the administrator *then* had as a lien on the debt which was assigned to them, if it was prior in point of time, must prevail, as the better title; but it is conceived that his responsibility gave him no title when he had paid nothing, against an actual existing creditor. Suppose by way of further illustrating this point, *Williams* the surety had been sued by the executor of *Helme*, could he have been entitled to the relief of this Court upon this bill, yet the Court must go the length of saying he would, if he is to be relieved in this case. This is indeed a stronger case against relief, for here there is a specific assignment of this debt to a particular creditor. In the case supposed, the debt from the surety, would, by operation of law, become assigned to the executor for the benefit of all the creditors; the death of *Helme*, could not give his creditors higher claims upon his assets, than he could by his own act during life, and we think it must be perfectly clear, that if a bill was filed against the executor upon the grounds made in this bill, the Court must say, "that its equity was imperfect, there was no equity *attached to the debt*, because there was nothing *paid* by the surety, that the assets were to be distributed amongst those who are creditors."

June 1828.

Williams v. Helme et al.

To examine this case upon first principles, it seems to me there cannot be a doubt—here is a dispute between two men respecting a piece of property, it being a debt due from *Williams* to *Helme*, and sold by him to the Defendants, does not at all make it different from any other property. The purchaser is content to take the title he obtained, and is not applying to this Court for its assistance—*Williams* sets up an opposite claim, and calls upon this Court to hinder the Defendants from using their means—the Defendants have paid their money, *Williams* at the time they bought, had never paid one cent, nor contracted to do so. His claim which he asserts to be superior to the Defendants, is not founded upon any contract express or implied, or any lien which the law, for purposes of policy, has afforded; nor is it sustained by any want of morality in the purchase of the Defendants; but he rests it upon the fact that he was surety for *Helme*, and that at the time *Helme* assigned the judgment, he was insolvent, whereby it was probable he would become a creditor, by being obliged to pay the debt of his principal—now unless it can be shown that a surety *de facto* acquires a lien upon the property in his possession belonging to his principal or that a surety has a superior equity to a creditor, it seems to me impossible to sustain this bill.

If *Williams* really did suspect the solvency of *Helme* at the time of giving the judgment, as he says was the case, then I ask, who is to be blamed for what has happened—the remedy for them was a plain one, his intestate had become *Helme's* surety for a debt, and by paying that debt immediately, he would then have had an equity to retain it—he thereby would have obtained a *title* in equity to it; why did he not pay it? Did not his intestate promise to do so, and shall it be said that it would have been hard to force him to raise the money by a sale of his intestate's estate, before *Helme's* proper-

ty was exhausted? But if *Helme* was then insolvent, or what is the same as to *Williams's* duty, if he thought he was, it become then absolutely necessary for *Williams* to pay the debt, or take a defeasance against the judgment. If the loss therefore, fell upon the estate of the surety, it is through the negligence of the administrator, and the rule seems well established, that those who occasion the loss ought to bear it.

HENDERSON, Judge.—The equity of the Plaintiff arises from the insolvency of *Helme*. The right of the latter to assign the judgment, was lost when he became unable to exonerate the Plaintiff from the thraldom in which he was placed on account of the suretyship—when *Helme* became unable to reciprocate the act which he required *Williams* to perform. I do not know a plainer equity; indeed it was admitted in the argument, that if *Williams* had, before the assignment, actually suffered, he would be entitled to the relief which he asks. Or if he had, before the assignment, applied to this Court to restrain *Helme* from transferring, that then the assignment would not avail, as it would have been made in violation of an order of the Court. *Williams* has other equities besides those arising from actual sufferings. As a surety, he has a right to have his fears and apprehensions quieted, to be made safe from apprehended harm. He need not wait till he has suffered, because his equity arises before that time; and this seems to be admitted in that part of the argument, which rather concedes, that he might have obtained an order that *Helme* should not assign. And as to the position, that *Williams* should have applied to a Court of Equity to restrain *Helme* from transferring, I think that his equity is higher than any which could arise from the violation of orders or rules of Court. It is independent of them—it arises from the principle first mentioned, that *Helme* could neither, by himself, nor by another, require of *Williams* to do, what

June 1828.

Williams v. Helme et al.

he (*Helme*) was unable to do towards him, from the fact of his insolvency. *Williams* being indebted to him, was also bound for him in a very large sum, from which he sustained a loss of double the amount of the sum which *Williams* owed. The debt which the Plaintiff owed, should have been left in his hands, as an indemnity in part for his loss. It is true, that if the judgment had been of a negotiable character, it would have been proper to have applied to a Court to restrain its negotiation; for had it been of that character, *Williams* might have had a legal owner to contend with, one who stood upon his own right, instead of those of another—and who would not, as these Defendants, represent the original creditor, and be bound by every obligation which was imposed upon him.

The Defendants say, it might possibly be different, if they were suitors to the Court; but they are not, they ask nothing of this Court. In this they are mistaken; they are applicants for a favor, in the character of Defendants. The law gives them nothing; their rights are not known at law. They would not be even heard to allege them—there *Helme* is still the owner of the judgment. Here, the Defendants are made parties by mere courtesy. The Plaintiff might have left them to come into this Court as petitioners, asking to be permitted to use the name of *Helme*. They owe their existence as claimants to the principles of this Court, and they ask to do, in the name of their assignor, what it would be the height of iniquity to permit him to do, because they say, that the latter sold to them—but *Helme* had nothing that he could sell. I think, therefore, that the injunction should be perpetuated. I have viewed the case, as if *Helme* intended no actual fraud, when he assigned to the Defendants. He says so, and there is nothing to induce a belief that he did. But the *fact* is, that he was then insolvent, and therefore could pass nothing in the judgment, as against the Plaintiff.

TAYLOR, Chief-Justice.—I am of opinion that the prayer of this bill could not be rejected, without violating very clear principles of natural justice, and subverting that series of decisions, by which this Court has been constantly guided, for the protection of sureties. It is not controverted, that the estate of the Plaintiff's intestate, who was surety for *Helme*, became liable to pay a considerable sum for him, a very short time after the confession of judgment, and that this money was subsequently paid out of the estate. It is very evident, that if *Helme* had attempted to enforce the judgment upon the expiration of the stay, he would have been enjoined, unless he countersecured the estate against his own debts. When the debts of *Helme* were paid out of the estate, his debt against it was extinguished, according to such plain principles of justice, that I imagine the law of every civilized nation has adopted them. In the civil law, it was called compensation, and is thus spoken of by a writer on that law: "When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law, without being pronounced by the Judge or opposed by the parties. As soon as a person, who was creditor of another, becomes his debtor of a sum of money, or other matter susceptible of compensation with that of which he was a creditor; and vice versa, as soon as a person who was debtor to another, becomes his creditor of a sum susceptible of compensation with that of which he was a debtor, a compensation is made, and the respective debts are from thenceforth extinguished, to the extent of their concurrence, by virtue of the law of compensation." (*Potior on obligations*, 599.) As the civil law exists in Scotland, the principle is there adopted without variation, and it is held that where the same person is both debtor and creditor to another, the mutual obligations, if they are for equal sums, are extinguished by compensation. (*Erskine's Institutes*, 325.)

June 1828.

Williams v. Helme et al.

Williams had a well ascertained equitable right against *Helme*, before payment of money for him, and might have called upon him in this Court to relieve him from his liability by payment of the debt, and would certainly have been allowed to set off the judgment against it. The case of *Lee* v. *Rock*, furnishes an instance where a man borrowed money on the mortgage of his estate for another of his being allowed to go into equity, to have his estate disencumbered by him, and the covenant in the mortgage deed was held to bind the Defendant, though no party to it; but the money being borrowed for him, it was his debt, and the surety was only a nominal person. (*Moseley* 319.) And he may not only come here to be relieved from his liability, but as soon as he becomes liable to the creditor, or is endangered, though he has not paid the debt, he has a right to enforce mortgages, or other counter securities given to indemnify him. (*Antrobus v. Davidson* 3 *Merivalle* 579, *Tankersly v. Anderson*, 4 *Dessaus.* 44.)

This was the relation in which *Williams* stood to *Helme* immediately after the confession of judgment, and when the true state of the latter's affairs were known. This equity was prior then to any which could be acquired by the assignees of the judgment. But there was in fact no equity to be acquired by them, for it would be against first principles that the assignor should place the assignee in a better situation than he stood himself. Policy has introduced an exception with respect to bills of exchange, and notes endorsed before they are due, but in all other respects the rule and law of this Court are on that subject universal. (*Cotes* v. *Jones*, 2 *Vern.* 692—*Davis v. Austin.* 1 *Ves. jun.* 247.)

As many of our most valuable principles of equity, as well as law, are derived from the civil law, it is not surprising to meet with almost the very case before us, stated in a work of authority on that law, as administered in Scotland. "Though, says the writer, compensation cannot be pleaded after the decree, either against the cre-

ditor or his assignee, yet if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assignee, till he give security for satisfying the debtor's claim against the cedent." (*Erskine's Institutes*, 328.)

PER CURIAM.—Let the Judgment be made perpetual with costs.

Robert H. Wynne
v.
Thomas Alston,
} From Franklin.

The vendor has a lien for the purchase money upon the land sold, against volunteers, and purchasers with notice.

It seems, that a creditor who takes a lien for an antecedent debt, is not entitled to the privileges of a purchaser.

The case made by the bill, answer, and the proofs in this cause, was, that the Plaintiff sold a tract of land to one *Jeffreys*, and took his bonds for the purchase-money; that *Jeffreys* never paid these bonds, but conveyed the land to one *Outerbridge*, to secure a prior debt, and that *Outerbridge* conveyed to the Defendant. The Defendant had notice of the non-payment of the purchase-money, and the only question was, whether the Plaintiff had a lien upon the land for its security.

Gaston & Badger, at a former term, argued for the Plaintiff.—The Reporter was not in Court when that argument was made, and has no note of it.

At this term, *Seawell*, for the Plaintiff, discussed the question extensively, and cited *Chapman* v. *Tanner*, (1 *Vern.* 267.) *Blackburn* v. *Gregson*, (1 *Bro. Ch. Rep.* 424.) *Fawell* v. *Heel* (*Ambler* 726.) *Nairn* v. *Prowse* (6 *Ves.* 759.) *Smith* v. *Hibbard* (*Dickens* 730.) *Charles* v. *Andrews* (9 *Mod.* 152.) *Macreath* v. *Simmons* (15 *Ves.* 334.) *Hughs* v. *Kearney* (1 *Scho. & Lef.* 132.) *Garson*

June 1828.

Wynne v. Alston.

v. *Green* (1 *Johns. Ch. Rep.* 308.) *Mills* v. *Grant* (2 *Ves. & Bea.* 309.) *Ex parte Peake* (1 *Mad. Rep.* 346.)

HALL, Judge.—It has been a long established principle in the English Courts of Equity, that the vendor of land sold, has a lien upon the land for the purchase-money in the hands of the vendee, or in those of any person claiming under him, with notice, although for a valuable consideration. (*Sug. Vend.* 386, and the authorities there cited.)

I am not aware that the question has been stirred in our Courts, before the present suit. It is therefore necessary to consider how far, on the ground of expedience and fitness, the doctrine should be introduced into our system of equitable jurisprudence.

When land is sold by the vendor for a certain price to be paid by the vendee, in point of justice and equity, the vendee does not become the owner of the land, until he has paid the price. Until the payment, the title of the vendor should not, in this Court, be divested. At law, when a legal title has been conveyed upon a nominal consideration, but the real one is unpaid, the vendor is concluded, and estopped from claiming the land; but in Courts of Equity, where real facts appear, and truth is not disguised, although the vendor cannot claim the land, it is but just and equitable that he should have a lien upon it, for the money for which it was sold. The equity of the rule is not altered, when it is applied to a purchaser from the vendee, although for full value, if he is affected with notice; because, having notice, he knows he is purchasing that which in justice and equity, his vendor had no right to sell. But, without such knowledge, as he has the legal estate, a Court of Equity will not interfere.

I think the equity here insisted upon, is an universal equity, applicable to all societies, that profess to be governed by principles of justice, let the form of their go-

vernment be what it may. Nor do I think it is varied by the circumstance, that in England, lands cannot be sold under a *fi. fa.* but are only subject to the *elegit*. This case is not one of a contest between the vendor and a creditor of the vendee, where the vendor having a legal title and possession, might have been trusted on that account. But it is that of a purchaser from the vendee with notice, who, at the time of the purchase, paid nothing for it, but who took it as an additional security for a prior debt.

This equity is not founded on any rule of policy which gives a preference to one creditor over another, but upon principles of natural justice, which prescribe, that when a person sells an estate in lands, he is not considered as parting with it, until the stipulated price is paid, or until surety is given for the payment of it in some other way.

It is said, that landed and personal estate are equally the subjects of traffic in this country, and that the lien in question is equally applicable to both; or, in other words, applicable to neither. It may be observed, that titles to personal estate, in times past, have been evidenced by possession, and passed from one person to another, with more facility than titles to real estate, which are always of record; and that equities connected with the latter, as in the present case, can only be enforced against those who were conusant of them. The science of law is however progressive; whether it will ever fix a lien upon personal estate, on behalf of the vendor in the hands of the purchaser, to the amount of the purchase-money, is not for me to predict. But with respect to real estate in England, from whence we have derived our notions of jurisprudence, I may be permitted to say *sic est lex*; and that the principle is worthy of adoption in this country.

HENDERSON, Judge, concurred in opinion with Judge HALL.

June 1828.

Wynne v. Alston.

Taylor, Chief-Justice, *dissentiente*.—This case presents, for the first time, the naked question, whether a vendor, making a deed and delivering possession to the vendee, retains a lien on the land for the purchase-money. It may now be considered as the established law of a Court of Equity, in England, that where the vendor conveys his estate to the vendee, without receiving all, or any part of the purchase-money, he has, as against the vendee and his heir, and all claiming as volunteers, or purchasers for a valuable consideration with notice, a lien upon the estate for the whole, or such part of the purchase-money, as was not paid; and this, although the consideration is on the face of the instrument, expressed to be paid, and a receipt endorsed. Upon this general rule, there is a concurrence among the authorities, though upon many points arising from the complicated system of Equity, which has been built upon it, there is considerable diversity of opinion among the most eminent Judges; as, for example, what kind of security received in payment amounts to a waiver of the lien. *Nairn* v. *Prowse* (6 *Vesey* 752.) *Macreath* v. *Simmons* (15 *Vesey* 341.)

It is not easy to ascertain at what period the doctrine was incorporated into the law; but the first reported case to be found in the books, can scarcely be called ancient. It is certain, that the refinements and intricate deductions from the rule, have arisen since our revolution. The existence of the lien, as a general question, was argued so lately as 1785, and though the Chancellor gave a strong opinion in favor of it, yet he would not decide it, in consequence of one of his predecessors having given an opinion that the vendors taking a bond, discharged the lien. *Blackburn* v. *Gregson* (1 *Bro. Ch. Rep.* 420.) It was again doubted in 1802, whether a vendor, who had taken the bond or note of the vendee for the purchase-money, retained his lien on the land. The question arose between a creditor, who claimed under an equitable mortgage, created by the deposit of a deed

and the vendor who had taken a deposit of stock, to secure the payment of the purchase-money. The Court determined, that by taking the deposit of stock, he had waived his lien; and the question between the creditor and vendor was not decided. (*Nain* v. *Prowse.*) Upon the whole, I think it may be satisfactorily gathered from the books, that the system was not so firmly established at the period of our revolution, as to require us to consider it as part of the Equity jurisprudence then in force in this State, and to render obligatory upon us, the subsequent adjudications which have arisen upon it.

It is said, there is a natural equity, that the vendor of land should retain a lien for the price of it; and there is some foundation for this equity, where the lands cannot be sold for the debts of the purchaser. But where land is liable to be sold on execution, to the same extent with chattels—where it is the subject of daily transfer and traffic, conveying a fee-simple estate in allodial right, (a thing of rare occurrence in England,) the equity is not stronger as to land, than as to chattels. Nor is it probable, that this doctrine would have been introduced in England, if the tenures there, and the process of execution, had been equally simple with those in this State. It is the policy of our law, and in harmony with our political institutions, that the right of aliening land, should be enjoyed by the owner, with unrestricted freedom; and that any person may safely give him credit, on the faith of an undisputed possession, and of a right, attested and authenticated by the public registry. The facility and security given to creditors, is perhaps more remarkably characteristic of the law of this State, than any other feature it possesses. All conveyances not recorded, and all secret trusts, are made void against them, as well as against subsequent purchasers without notice. But the security held out to creditors, would be hollow and unsound, if these latent trusts were permitted to rise up against them, and defeat a title honestly acquired from

JUNE 1828.

Wynne v. Alston.

the apparent owner. The sound and wholesome doctrine is, if the vendor sells without receiving the price, and cannot trust to the solidity of the vendee, let him create a lien upon the land, by taking a mortgage, and register it within the time now required by law. If it is understood, that a purchaser, after searching the Clerk's office for judgments and executions, and the Register's office for incumbrances, and finding all clear there, must still take the title at the risk of some unrecorded equity —some inscrutable lien, a very serious obstacle will be opposed to the alienation of real estate.

I believe there are but few States in the Union, which have retained the British law as to executions against land. I know of but one, Virginia—though there may be others. There the principle prevails, that the vendor has a lien upon the land for the purchase-money; and where the writ of *fieri facias* cannot reach land, there is a semblance of justice in the adoption of the principle. It also prevails in New-York, where the *fieri facias* does reach land; but in some of the States, under the like circumstances, the doctrine is partially, and in others, entirely rejected. In Pennsylvania, the vendor, parting with the legal estate, retains no equitable lien for the unpaid purchase-money; but he does retain it, if he parts only with the equitable title. (1 *Yates* 393.)

The question was brought before the Court of Chancery in South-Carolina, so lately as 1808, when it was distinctly adjudged by the Court, consisting of three Chancellors, that a vendor, selling lands and conveying them in fee, and taking a bond for the purchase-money, without taking a mortgage, has no implied lien on the land, so as to give him any preference over the creditors of the purchaser. *Wragg* v. *Comptroller-General*, (2 *Dessaus.* 509.)

For these reasons, I should have been of opinion, that the bill be dismissed; but as the question had not been

before brought into discussion, I think it should be without costs. But as my brothers are of a different opinion, there must be a decree for Complainants.

PER CURIAM:—Direct an account to be taken of the purchase-money unpaid.

James Martin, adm'r. of Randolph Maberry, v. Lucy Maberry, Abraham Maberry & others, } From Iredell.

A bill of Interpleader can only be filed by one in possession. Therefore, where an administrator never had reduced the assets into possession, but they were in that of some of the distributees, who claimed adversely to him; a bill by him against the distributees, praying that they might interplead, is improper.

But the Defendant to such bill, who claimed adversely, having answered, filed a cross bill, submitted to an account, &c. he was enjoined from computing the time spent in this litigation, in bar of an action at law, to be brought by the administrator.

The bill alleged, that letters of administration upon the estate of *Randolph Maberry*, issued in May, 1824, to the Plaintiff—that under them he took possession of part of the personal estate of his intestate; but that a number of negroes belonging to the Plaintiff's intestate, were, at his death, in the possession of the Defendant *Abraham*, who claimed them for one year, under a contract of hire from the intestate. That other slaves, of which the intestate died possessed, were detained from the Plaintiff by the Defendant *Lucy*, who was the widow of the intestate, and who claimed the last mentioned slaves, under the will of a former husband. That the Defendant *Lucy*, and the other Defendants, the children of the intestate by a former marriage, were his distributees. That the children contended, that the negroes of

June 1833.

Martin v. Maberry.

which the Defendant *Lucy* had possessed herself, had by her intermarriage with the intestate, vested in him, and formed a part of his personal estate, and insisted that the Plaintiff should make distribution of them, and also of those in the possession of the Defendant *Abraham*.

The bill then averred, that both the Defendant *Lucy*, and the Defendant *Abraham*, had refused to deliver to the Plaintiff, the negroes of which they were respectively in possession.

The prayer was, that the several Defendants might interplead, and have their rights adjusted, so that the Plaintiff might be indemnified in making distribution.

From the transcript of the record of the Court below, it appeared that the bill was filed in 1824; soon after the Defendant *Lucy* filed a cross bill. The Defendants answered.—Proofs were taken—an account directed—a report made—the causes set for hearing, and removed to this Court.

At the last term, *Badger*, for the Defendant *Lucy Maberry*, moved to dismiss the bill. He argued, that in no case, could a bill of interpleader be sustained, where the Plaintiff was not in possession; and insisted, that this bill was without a precedent. The title of the Plaintiff, if he had any, was purely legal, and he comes into this Court, being out of possession, and asks that the person who claims a legal title, adverse to his, may interplead with one whose title is purely equitable, and for whom he (the Plaintiff) is a trustee.

Wilson, for the Plaintiff, insisted strenuously, that this was a proper case for a bill of interpleader—that the Plaintiff was a trustee, and had a right, not only to be protected from an expensive litigation, but to ask the advice of the Court. He argued, that it was against first principles, to permit a Defendant, after submitting to answer, and after taking proofs, and going on to the hearing, to move for a dismission. For this he cited the opinion of KENT, Chancellor, in *Underhill* v. *Van*

Courtlandt (2 *Johns. Ch. Rep.* 369.) He urged vehemently, at all events, if the bill should be dismissed, that the Defendant, *Lucy Mabarry*, should be enjoined from taking advantage at law, of the statute of limitations, or the lapse of time which had occurred since the filing of this bill.

CUR VULT. ADV.

HENDERSON, Judge.—We cannot sustain this as a bill of Interpleader—for in such bills the equity of the Plaintiff is to be indemnified in the *delivery* of property, of which he is in possession, and to which he claims no right. The Plaintiff not having the possession, is unable to do the only act for which an indemnity is given. But I think that he has an equity, growing out of the motion to dismiss the bill at this late period, after the Defendant has submitted to the jurisdiction of the Court. The Defendant should be restrained from computing the time which has elapsed during this litigation, in support of the plea of the statute of limitations, in any suits which may be brought at law by the Plaintiff, for this property. There would be no doubt of this equity, if the subject matter of this suit was of equitable cognizance, and in principle, under the circumstances of the case, I think there is no difference.

From the commencement of this suit, the Defendant either believed that this Court had not jurisdiction, or that it had. If he believed the former, and had the present motion in view, he has been guilty of a gross fraud in every step taken in this cause, from which the Plaintiff might infer that he intended to try the question here. His opposition to the application for an injunction against computing the time spent in this Court, is strong evidence that his object was to deceive the Plaintiff. If he did not know from the first, that this bill was improperly framed, but has lately been apprized of it, he wants the common feelings of humanity, in wish-

June 1818.

Martin v. Maberry.

ing to visit the Plaintiff with the most disastrous consequences, for the crime of ignorance, in which he himself so fully participated. I think that the equity of the Plaintiff is much heightened by the circumstance, that it is not the loss of property, to which he is to be subjected, if barred by the statute, which many can bear with equanimity, but he is to be overwhelmed with a large debt, which few can endure in the like manner.

This case is also of a nature well calculated to mislead upon the question of jurisdiction. The property in contest, is claimed from the same person; the right of the parties depend upon the construction of the same instrument—the Plaintiff is an administrator, and not personally interested. He is a bare trustee; the property was in the possession of some of the next of kin, and of persons claiming under them, and holding adversely to the claim of others also next of kin. It was therefore more convenient to go into a Court of Equity, as one suit would settle the whole controversy. And no doubt, it was thought, that the want of possession was a mere matter of form, as the persons who had it were brought before the Court, and that, upon a final adjustment, possession could as well be delivered by them, as by the Plaintiff. Under this impression, the bill, and a cross bill, were filed—answers made—depositions taken—an account ordered—the cause set for hearing—removed to this Court—and all necessary interlocutory orders made. And after all this time spent, and costs incurred, when the cause is ready for trial, this motion to dismiss is made, for want of jurisdiction in the Court, in which the Defendant has been an actor himself. Justice and Equity require, that as the Defendant now declines to submit the trial of his case to this Court, that the time which has been spent in this litigation (honestly on the part of Plaintiff) shall not be computed, in support of a bar for the Defendant, under the statute of limitations, should suit be brought at law. The advantage was either

fraudulently acquired, or obtained through the ignorance of *both* parties. One should not be so highly benefited, and the other so severely punished. But the Plaintiff must pay the costs of the suit.

Per Curiam.—Retain the bill, and direct, that if the Plaintiff sues at law, the time during which this bill has pended, shall not be computed, upon the plea of the statute of limitations.

James H. Smith, adm'r of Edwin Smith
v.
Bryan Smith.
} From Johnston.

The order in which parties to a security are liable at law, is the order in which, independently of contract, they will be held bound in equity.

In equity, however, by contract, the endorser may be made accountable to the maker and the acceptor to the drawer, &c.

Where A, as surety, signed the note of B, payable to C, and it was endorsed by C at the request and for the accommodation of B, there being no contract between A and C whereby they agreed to become co-sureties of B, it was held that A had no right to contribution from C.

The bill charged that the Plaintiff's intestate in March 1825, signed a note with one *Robert H. Helme*, payable to the Defendant for $8,911. That after signing the note, it was delivered to *Helme*, who procured the Defendant to endorse it—that the signature of the Plaintiff's intestate, and the endorsement of the Defendant, were both voluntary and for the accommodation of *Helme*, who procured the note to be discounted at the State Bank, solely for his own benefit—that *Helme* became insolvent, and the Plaintiff's intestate had paid the whole amount of the debt. It was insisted that the Defendant was a co-surety with the Plaintiff's intestate and liable to contribution, which was the prayer of the bill.

June 1833

Smith
v.
Smith.

The Defendant, in his answer, admitted that he endorsed the note at the request of *Helme*—he averred, that at the time of his endorsement, he had no knowledge that the Plaintiff's intestate was a surety—but that he then believed the Plaintiff's intestate had a joint interest with *Helme*, in having the note discounted. He denied that he would have endorsed the note for the accommodation of *Helme*, had he known that the latter was solely interested in the discount, and stated that when the note was handed to him, and his endorsement asked for, he hesitated, as the amount was large, but that *Helme* removed those doubts by informing him, that he, the Defendant, could not suffer until the Plaintiff's intestate and himself had both failed, and upon this assurance, having confidence in the solvency of the former, he endorsed the note and handed it back to *Helme*.

The deposition of *Helme*, was read upon the hearing —he swore that at the time when the Defendant endorsed the note, no communication was made to the Defendant, of the relation in which the Plaintiff's intestate stood to the note—that he had stated to the Defendant, that the Plaintiff's intestate was bound to indemnify him, in case he, *Helme*, failed, but that this was given as the witness's opinion upon the point of law, not as a fact touching the Plaintiff's *intestate*'s connexion with the note. He further proved, that the Plaintiff's intestate had no interest in the note, except as a surety, and that in his opinion, the Defendant would not have lent his name, unless that of the Plaintiff's intestate, or some other as good, had been upon the face of the note.

Badger & Devereux, for the Plaintiff.—The only difference between this case and that of *Daniel* v. *McRae*, (2 *Hawks* 590,) is that there, the obligation of the parties in law, rested upon the same event, viz. the default of the maker—here the Defendant has undertaken to pay the debt of *Helme*, if both *Helme* and the Plaintiff's in-

testate failed to do it, and if he had notice of their default. If the legal effect of the contract is to govern, it must be admitted, that the bill should be dismissed; in other words, if by law, the Defendant is a supplemental surety to the Plaintiff, and the contrary cannot be shown, the latter has no claim against the former.

Sureties are made supplemental either by act of law, or by express contract. The relation of these parties to each other is of the first kind, there is no express contract between them, and that under which the Defendant seeks to protect himself is one inferred by law. It is therefore admitted, that at law, the Defendant is a supplemental surety to the Plaintiff's intestate, and that the latter has, by the forms of law, no redress against the former. But the same thing occurred between *Daniel* and *McRae*; there *McRae* had the legal title to sue, he was an endorser subsequent to *Daniel*, and at law had a full redress against him—the forms of law therefore, made him supplemental to *Daniel*—but equity regarding the substance of the transaction, and seeing that in fact he lent his name for the accommodation of the maker, took from him the legal advantage which made him supplemental, and held him to be a co-surety. The legal priority then which exists between a prior and subsequent endorser, was of no avail to *McRae*. To hold therefore, that the legal advantage existing in favor of the Defendant in the present case, makes him supplemental, is to hold that in one case the court is not bound by the forms of law, but that it is in another—for in what do the cases differ—in both the object was the accommodation of the principal debtor—the liability in both was incurred at his request—no benefit resulted to the litigant parties. The Plaintiff's intestate in the present case, is in equity, as fully a surety, as the Defendant, or as *Daniel* or *McRae* were. The only difference between the cases, is that pointed out above, viz. that *McRae* and *Daniel* were endorsers, the Plaintiff was a

June 1828.

Smith v. Smith.

surety on the face, whereas the Defendant was an endorser. But a Court of Equity, in all cases, looks at the substance of the transaction, and universally, the only enquiry is, whether in point of fact the party against whom contribution is sought, is a co-surety, or whether he is supplemental; if he is in fact a co-surety, he is held to contribution, notwithstanding all forms, whether created by law, or by express contract.

In *Craythorn* v. *Swinburn* (14 *Ves.* 160) *John Swinburn* gave a bond, conditioned to pay a Bank £1200, if *Henry Swinburn*, the debtor, and *Craythorn*, the Plaintiff, his surety, in a joint and several bond, did not do so—and upon a payment by either of them, then the bond was to be void. No rule of law, applicable to the present case, would more strongly put the Defendant's liability, upon the fact of a default by the Plaintiff's intestate, than the express engagement of *John Swinburn*, in that case, put his, upon the default of *Craythorn*. The words are clear and explicit. At law, the bond was discharged, the condition being performed by the payment of the debt by *Craythorn*. *Craythorn* having paid the money, filed his bill for a contribution. At law, he was clearly without remedy—his suretyship being distinct from that of *Swinburn*, and *Swinburn* clearly discharged by *his* payment. *Lord Eldon* does not decide the case upon the writing—upon the bond, nor dismiss the bill, because *Swinburn* was only bound upon the default of *Craythorn*; but he hears testimony, and enquires whether, in point of fact, *Swinburn* was a supplemental, or a co-surety; and it is expressly proved, that by *Swinburn's* contract with the Bank, he was a supplemental surety. Upon that enquiry had, it turned out that he had made no communication to the Bank—that he lent his name for the use, and at the request of the principal debtor, the result would have been different. We must infer, that his Lordship's object in hearing testimony was, to ascertain these facts, or others, which in his mind would make

the Defendant a co-surety, notwithstanding the form of his obligation, and that this, if proved to his satisfaction, would have produced a decree for contribution, notwithstanding the form of the contract. To this we are driven, or to the absurd conclusion, that *Lord Eldon* did not understand the legal effect of the bond given by the Defendant. In dismissing the bill, he uses the words "my opinion is wrong, if *Sir John Swinburn* is a co-surety." This case then, as far as *Lord Eldon* is an authority, proves, beyond a doubt, that if by express contract, the liability of the Defendant was postponed to that of the Plaintiff's intestate; in other words, if he wrote himself out of the character of a co-surety, and made himself expressly supplemental, yet, if in point of fact, he was a co-surety, he shall be held to contribution.

The cases of *Love* v. *Wall* (1 *Hawks* 313) and of *Daniel* v. *MacRae* (2 *do.* 590) are express to prove, that a contract implied by law, may be varied by testimony; to these may be added, the case of *Wright* v. *Latham*, (3 *Mur.* 298.) In *Daniel* v. *MacRae*, Judge HENDERSON says, "I am at a loss to discover how the admission (of such testimony) could ever have been doubted—its admission contradicts no express written agreement, but repels an implication only."

If then, the form of the security does not prevent the *prima facie* supplemental character of the Defendant from being explained, but his relation to the Plaintiff may be shown by testimony, what is the character of that testimony? Who was the principal debtor? At whose request, and for whose accommodation were the liabilities of the Plaintiff and Defendant incurred? Who was accommodated by the discount? Was there any communication from either of the sureties to the Bank? If it be said, that the Defendant doubtless thought he made himself supplemental, it is answered so did *McRae*—so did *Swinburn*. But the rights of parties are not to be decided by their suppositions of the legal effects of their acts; if so, no person would ever

June 1828.

Smith v. Smith.

think he exposed himself to a loss by his own act. The same observation may be made, as to the argument *Helme* used to obtain the endorsement of the Defendant. The law is to decide between the parties to this suit. The thoughts of *Helme* are not the rule for ascertaining them.

If it be objected that the Bank might have discharged the Defendant by not giving him notice, and thus have destroyed the Plaintiff's right; it is answered 1st, that the same thing might have been done in *Daniel* & *McRae*, the Bank might not have notified *McRae*—but notwithstanding this incident to the form of the contract in that case, he was held to contribution. 2d, If the Defendant was discharged as to the Bank, it would not affect the Plaintiff's right against him, as being *res inter alios acta*. But if it would, then clearly the Bank would have been bound to indemnify the Plaintiff's intestate, (he being as to them a surety,) precisely as if they had discharged a mortgage made by *Helme* for their security. (*Hayes* v. *Ward*, 2 *Johns. Ch. Rep.* 129.)

HENDERSON, Judge.—The cases of *Love & Wall* and of *Craythorn* & *Swinburn*, decide not only that the order of liability arising upon the face of the transaction is the rule of this Court, as well as at law, in fixing the relation of principal and surety, and that of co-surety and supplemental surety; but that this relation may be varied by contract, whatever may be the form of the security; for that is made *diverso intuito*, and that the prayer of the note may be the surety of the maker, the endorsee of the endorser, drawer or acceptor. But until this relationship is varied by evidence of such contract, the order of liability is the same here as at law, that is, such as it appears to be upon the face of the security. This seems to be admitted in argument by the Counsel for the Plaintiff, but it is insisted that the very circumstance of its being known to the Defendant that the Plaintiff's intestate, one of the makers, was not a

principal in the note, but only a surety for *Helme*, created of itself this agreement of mutual liability between the maker and endorser, without any actual communication between them, and in fact that this was so strongly the case, that no understanding of the Defendant to the contrary, in the absence of the Plaintiff's intestate, and without his knowledge, could control or vary it. This is certainly extending the doctrine farther than the principle will warrant. It is binding a person not only without his consent, but in opposition to it, and where no fraud is imputed to him; it is placing him in a grade and order of liability, which is in accordance with neither his *act* nor his *intent*, and this without the least imputation of fraud. This case certainly is distinguishable from the case of *Craythorn & Swinburn*. There the surety became bound, or was willing to become bound with his principal. He did not, and could not understand that any other person was to be bound as co-surety with him. In this case it is probable that *Smith* the maker, might have understood and believed, that the Defendant would be equally bound with him, as the note could not be discounted without his agency; but if he did, this could not create an obligation on the endorser without his assent, and without fraud. His (the intestate's) understanding alone, would not change the operation of law upon the transaction. It required also the assent of the endorser, or that he should be guilty of some fraud, to subject him. To do so in this case, would be to subject him in opposition to the manner in which he bound himself, viz. the form of the security, and also in opposition to what he intended to do, according to his declarations at the time of endorsing.

Per Curiam.—Dismiss the Bill with costs.

June 1828.

Lewis Ellis
v.
William Ellis. } From Edgecomb.

The act of 1819, (*Rev. ch.* 1016) respecting parol contracts for the sale of lands and slaves, and the Statute of Frauds, (29 *Char.* 2,) were made to effect the same object, and should receive the same construction.

Therefore, where the whole purchase money was paid, and possession delivered according to the contract, although no note in writing was made of it, a specific execution was decreed.

The Plaintiff alleged, that in the year 1821, he purchased of the Defendant a tract of land, at a stipulated price, which was agreed to be paid in a bond of one *W. J. Stanton* and *J. S. Peel*, payable to one *R. Peel*, as guardian to the wife of the Plaintiff, and her brothers and sisters—that the bond exceeded the amount which the Plaintiff, in right of his wife, was entitled to receive from the guardian—and to obviate this, it was agreed, that the Plaintiff should give his bond to the guardian, for the balance, after deducting the sum which was due him, in right of his wife, and that the Defendant was to become surety for him—that to indemnify the Defendant in this suretyship, a mortgage on the bargained premises was to be given him. That according to this contract, the bond of *Stanton* and *Peel* was assigned to the Defendant, a bond given by the Plaintiff and Defendant to the guardian, and the Plaintiff put in possession of the land—that from ignorance of the manner in which the deed of bargain and sale, and the mortgage should be drawn, they never had been executed.

The bill then charged, that the Defendant pretending the Plaintiff was bound to him as a guarantor of the bond of *Stanton* and *Peel*, who had proved insolvent, had refused to convey the land sold, and had commenced an action of ejectment against the Plaintiff to turn him out of possession.

The prayer of the bill was for an injunction and a specific performance of the contract of sale.

The Defendant in his answer, relied upon the act of 1819, (*Rev. ch.* 1016.) He also denied the equity of the Plaintiff's bill; but it is not necessary for the purposes of this report, to give his views of the contract of sale.

The injunction had been dissolved, and it appeared from a copy of the record of the action of ejectment, which was filed as an exhibit, that the Plaintiff had been turned out of possession, and that the Defendant, had recovered for the mesne profits.

Hogg, for the Plaintiff.—The Plaintiff is entitled to a specific performance. The bill is not founded on the contract, which is void in equity as well as at law, by the act of 1819. The Defendant is not obliged to convey his lands on a parol contract, until he signs a written agreement. He has a *locus penitentiæ*, and he may exercise it, provided he has practised no fraud on the Plaintiff. The right to relief is not founded on the contract, nor even on the payment of the consideration. Neither is it founded upon any supposed right a Court of Equity has to set up a parol contract void at law; but the Plaintiff applies to the ancient jurisdiction of a Court of Equity, to redress *a fraud* for which a Court of Law cannot give adequate relief. He does not complain that the Defendant has refused to comply with his parol contract, but that by performing it in part, he has induced the Plaintiff to pay the consideration of the purchase, and to enter *on the possession*, and afterwards treated him as a trespasser, by ousting him by ejectment, and compelling him to pay the mesne profits in damages.

The Defendant admitted the Plaintiff to possession in good faith, and meant to make him a deed; but failing in his calculation to receive the money on the bond of *Stanton & Peel*, he aims, by refusing the deed, to charge his loss, arising from the insolvency of *Stanton & Peel*, to his innocent vendee, when, in justice, it ought to be borne by himself, as the result of his own want of information, caution or diligence.

June 1828.

Ellis v. Ellis.

If the Plaintiff had simply paid his money, without getting possession, he might be left to redress at law, by his action for money had and received; but by admitting the Plaintiff to the possession, and receiving his money, the Defendant has so committed himself by a part performance, that he cannot go back without fraud. Indeed he meditates a fraud in going back, and the Court will apply themselves to his conscience, and compel him to convey. In no other way can the Plaintiff be safe from the contrivance of the Defendant. He has advanced his money, and committed acts that will be trespasses at law, on the faith of possession delivered by the Defendant, and the law can afford him no adequate relief. The jurisdiction of a Court of Equity to decree a conveyance, where there has been a part performance, is established in England, notwithstanding the statute of frauds, from which our act of 1819 is substantially taken.

Generally, the dispute is, what shall be deemed a part performance. It has been a vexed question, whether payment of the purchase-money is a part performance; and it has been decided, that a part payment, by way of earnest, is not—and it is strongly intimated, that full payment will not entitle a purchaser to a specific performance; but the admission of the vendee to the possession, is a part performance, and entitles the vendee *per se* to specific relief; and certainly, the payment of the whole purchase-money, and the possession, are strong circumstances in the equity of a vendee. There is, it is believed, not only no authority, but no dictum to the contrary. (*Buckmaster* v. *Harlop*, 7 *Ves.* 345, 347. *Butcher* v. *Stapely*, 1 *Vernon* 363. *Clenan* v. *Cooke*, 1 *Sch. & Lef.* 22. *Sugden's Law of Vendors*, 84, *& cases cited. Newland on Contracts*, 182—185.)

Gaston, contra, contended, that the Plaintiff's right to relief was founded solely upon the contract. He insisted that there was a material difference between the statute

of Frauds (29 *Char.* 2) and our act of 1819, that the first did not annul the contract, but simply forbid an action to be brought upon it, whereas in our act of 1819, the Legislature had cautiously avoided the language of the 4th section of the statute of Frauds, that concerning contracts—and had adopted the words of the 5th section concerning wills. He observed that the English Judges had of late lamented the inconsistencies which the liberal construction of the 4th section of the statute, had generated, and that this liberality had never been applied to the 5th. By using the words of the latter, he argued that the Legislature had plainly intimated an intent to exclude the construction which the 4th section had received. He then commented upon the cases in which the 4th section had been construed, and endeavored to prove that the introduction of the principles which governed them, would introduce confusion into the jurisprudence of the State, and argued strenuously to enforce the propriety of a more simple rule of construction.

Hogg, in reply, observed, that the 5th section of the statute had, in England, received the construction he contended for; that their Courts of Equity had relieved in cases of frauds, upon devisees in unattested wills. For this he cited *Newland on Contracts*, 179.

TAYLOR, Chief Justice.—I think there can be no reasonable doubt, that the act of 1819, was made to effect the same object with the statute of frauds and perjuries, so far as it respected parol contracts, of sales of land.—The mischief here was of the same character with that sought to be remedied in England, and the full extent of it had recently been brought into view, by a decision of this Court, decreeing the specific execution of a parol contract, where there was no part performance.

There is some difference in the phraseology of the two statutes, but none I think in their substantial meaning. Our act makes all contracts, to sell or convey any

June 1826.

Ellis v. Ellis.

lands, void and of no effect, unless they be put in writing. The statute of *Charles* prohibits the bringing any action upon any contract, or sale of lands, or any interest in, or concerning them, unless the agreement, on which such an action shall be brought, or some memorandum or note thereof shall be in writing &c. And this would extend to prevent the institution of a suit in equity, as well as at law, it is equally operative with our act, since depriving the party of all remedy on a contract is equivalent to annulling it. In this view, I think, the expositions of the statute of frauds are applicable to ours, and that after a system has been built up by the judgments of a succession of able men, it would be unwise and unsafe, to depart therefrom.

In the present case, the purchase of the land was made by the Plaintiff, and he let into possession thereof with the Defendant's consent. Now, if the purchase-money was paid according to contract, or there was no agreement to guaranty the note of *Stanton & Peel* (which is a subject of future enquiry) it is equitable that the Plaintiff should be quieted in his purchase; and indeed it would be flagrant injustice to allow the Defendant, after receiving the price, and giving up the possession, to commit a fraud, under the sanction of a statute made for the prevention of fraud. If this agreement should not be performed, the Plaintiff, by being put into possession, has had a fraud practised upon him, and made a trespasser, and liable to account for the rents and profits. To show that he entered by agreement, and thus defend himself from the charge of being a trespasser, it is allowable to prove the parol agreement, and the delivery of possession; and being allowed for that purpose, it is equally reasonable that it shall be allowed throughout. This principle is illustrated and explained in a satisfactory manner in the case of *Clenan* v. *Cooke*.

Nor does it seem that any mischief can arise under this construction, guarded, and limited as it is to those

cases, where the acts done are of such a nature, that they could not possibly be executed with any other view, than to perform the agreement; for if they are equivocal, or might have been done with other views, the agreement will not be taken out of the statute. (*Ambler* 586.) A plainer case, with respect to the design of delivering possession, cannot well exist than this: it was the clear intention of both parties, that it should be in execution of the agreement; and if the Defendant has, in fact, been paid according to contract, he ought to be enjoined perpetually, and decreed to execute a deed.

PER CURIAM.—Direct an account to be taken by the Master of the purchase money, and let him report upon the nature of the guaranty, which the Defendant claims the Plaintiff to have given of *Stanton & Peel's* bond.

Frances Liles
v.
Robert Fleming, ex'r. of Jacob Liles and others. } From Wake.

A post-nuptial agreement, made upon sufficient consideration, between husband and wife, will be enforced in Equity.

Where there was an agreement to settle property upon the wife, and the husband, by will, bequeathed that property to a stranger, it was held, the wife having dissented from the will, that her right to a child's part of the personalty, could be defeated only by a satisfaction in express words, or one resulting from a necessary implication, and there being neither, that she was entitled both to the settled property and to her child's part.

The Plaintiff in her bill alleged, that upon a treaty of marriage between her and the Defendant's testator, it was agreed by the latter, that in case there should be a child of the marriage, all the property to which the Plaintiff was entitled, either in possession or in action, should be settled upon her. That the marriage took

JUNE 1828.

Liles v. Fleming.

place, and upon the birth of a son, who was named *Richard Liles*, the Defendant's testator executed the following instrument:

"Be it known to all whom it may concern, that I, *Jacob Liles*, of &c. having intermarried with *Frances Holland*, widow, &c. and by her having had one son, called *Richard Liles*, I do hereby certify, that all the property which came by my said wife, of every description, I give to her and her heirs forever. In witness, &c."

The bill then charged, that the Defendant's testator had taken into his possession sundry slaves, and some bonds and money, which belonged to the Plaintiff before her marriage with him—that by his will he had bequeathed several of those slaves to his children by a former marriage, and in it had made a very small provision for the Plaintiff, who had regularly entered her dissent from it.

The prayer was, to have the defective instrument set up, and also for a distribution of the assets of the testator.

The Defendants, in their answers, put the Plaintiff to the proof of the ante-nuptial agreement, and insisted, if it was made, that the Plaintiff should be put to her election—contending, that she could not claim under the agreement, and also her share of the testator's assets.

The facts set forth in the bill, were fully established by the testimony of the Plaintiff's mother and sister, whose depositions were read.

Devereux, for the Plaintiff, contended, that the right of the widow to a child's part of her husband's personal estate, was a right which the law gave her; that it was similar to the right of dower at common law, and it had always been held, that nothing but express words, or the most necessary implication, should bar the right of dower.

W. H. Haywood, contra.

TAYLOR, Chief-Justice.—This bill is brought for the twofold purpose of setting up a contract, made by the testator of the Defendant with the Plaintiff, his then wife,

whereby he gave her all the property which he had acquired by his marriage with her, and to obtain likewise, a distributive share of the personal estate of her said late husband. The contract made after marriage, is stated to have been in execution of a parol treaty, made before the marriage, whereby the husband agreed to settle upon her, in the event of her having a child by him, all the property she then possessed, or was entitled to. The writing does accordingly admit, that she has a son, named *Richard Liles*; and there is proof, by two witnesses, the mother and sister of the Plaintiff, that *Jacob Liles* had declared in his lifetime, that he had executed the paper in pursuance of his engagement entered into before marriage. The contract of marriage is a valuable consideration, and a settlement, made by the husband after marriage, is binding upon him, and all persons claiming as volunteers, from or through him. How far the peculiar circumstances of this contract would render it valid, against creditors or subsequent purchasers, is not made a question in the case. The intervention of a trustee is indispensable at law, to enable the husband to convey property to his wife; but there are several cases in this Court, where the husband's gifts to the wife, directly made, will be supported, although no property in the things given, passed to the wife at law, by the delivery. The following cases extend fully to the establishment of this principle. *Lucas* v. *Lucas*, (1 *Atk.* 270,) *Stanning* v. *Style*, (3 *P. Wms.* 338)—*Bledsoe* v. *Sawyer*, (1 *Vern.* 244, *Bunbury* 205.)

The law proceeds strictly upon the notion of union of person in husband and wife, and it is only in some extreme and excepted cases, that the wife can implead or be impleaded, without her husband; but in Equity, she may be a Plaintiff or Defendant, without the concurrence of her husband, as in cases where she prays relief against him. (*Terry* v. *Terry*, *Pres. Ch.* 275. *Lambert* v. *Lambert*. 1 *Ves. jun* 21.) And she may defend a suit sepa-

June 1828.

Liles v. Fleming.

rately, when her interest in the subject of litigation is contradictory to her husband's claim, and in other instances. (*White* v. *Thornborough, Pres. Ch.* 429. *Ex parte Halsam*, 2 *Atk.* 50.) Equity, it is said, regards not the outward form, but the inward substance and essence of the matter, which is the agreement of the parties, upon a good and valuable consideration; so that although a covenant be extinguished at law by the marriage of the parties, this Court will establish it. (*Cannel* v. *Buckel*, 2 *P. Wms.* 243. 1 *Fonbl.* 39.)

As to the remaining question, whether the Plaintiff is to be put to her election? it is believed that the law has left no discretion on the subject; for however desirable it might be, that in so small an estate, the testator's children should exclusively enjoy the benefit of it, yet the widow's claim to distribution is founded on a clear legal right. The principle to be extracted from all the cases is, that an intention to exclude that right, must be shown, either by express words, or a manifest implication; but there is here nothing from which such an intent can be inferred.

Per Curiam.—Declare that the Defendant's testator made an agreement in the bill mentioned, and direct an account of the property of the Plaintiff at the time of her marriage; and also of the assets in the Defendant's hands.

JUNE 1828.

James McCabe & wife and others
v.
Benjamin Spruil and others, executors of Charles Spruil.
} From Tyrrell.

A testator directed his lands to be sold and the proceeds divided among his "heirs not heretofore mentioned." *Held*,

1st. That the land should be considered as money, and that the word "*heirs*" meant those who were entitled under the statute of distributions.

2d. That the words "*not heretofore mentioned*" applied only to those taking beneficially under the will, and not to a legatee in trust.

This cause was heard in the Court below, by his honor Judge MARTIN, on the Fall Circuit of 1827, when the facts were, that *Charles Spruil* duly made his will, and appointed the Defendant *Benjamin* his brother, one of his executors. After several pecuniary legacies to his relations, and among them one to the Defendant *Benjamin*, in trust for a sister of his and the testator, he devised as follows:—

"My will and desire is, that all my other estate both "real and personal, be sold at the discretion of my ex- "ecutors, and the money arising therefrom to be equally "divided amongst my other heirs, not heretofore men- "tioned."

Two questions were submitted to his Honor, viz.

1. Whether the fund, created by the sale of the land belonging to the testator, should be divided among his personal or real representatives, who were parties to the suit.

2. Whether the mention made of the Defendant *Benjamin*, in the first part of the will, appointing him a trustee for his sister, prevented him from claiming any part of the residuum.

His Honor decreed that the proceeds of the land should be divided according to the statute of distributions, and that the Defendant *Benjamin*, was not entitled to any part of the residue.

JUNE 1828.

McCabe v. Spruil.

From this decree, the Defendant *Benjamin*, appealed to this Court.

Hogg, for the Appellant, upon the first point, cited *Holloway* v. *Holloway*, (5 *Ves.* 402)—*Bridge* v. *Abbot* (3 *Bro. Ch. Rep.* 224)—*Evans* v. *Charles*, (1 *Anst.* 128.) Upon the second point he contended, that by the words "heretofore mentioned," the testator obviously meant those who took a beneficial interest under the will.

Gaston & Badger, contra, cited *Croom* v. *Herring*, (4 *Hawks* 393) and *Doe ex dem. of Stewart* v. *Sheffield*, (13 *East.* 526.)

TAYLOR, Chief-Justice. It is a well known rule of equity, that land directed to be sold and turned into money, shall be considered as money, unless there is some plain intention to the contrary, and whether the direction is given by will, or any other instrument, makes no difference.

What description of persons is to be understood by the word *heirs*, as applied to personal property, has not been positively settled by any adjudication, though strong opinions have at times been expressed upon it. Thus in *Holloway* v. *Holloway*, it is said, that though the word *heirs* has a definite sense as applied to real estate, yet as to personal estate, it must mean such persons as the law points out to succeed to personal property. If personal property were given to a man and his heirs, it would go to his executors. And this is the only construction we can give to it in this will, which will therefore confine the bequest to such as are entitled under the statute of distribution.

I do not think there is any sufficient reason for excluding *Benjamin Spruil* from this distribution. By excluding those who had been mentioned in the will, the testator must have meant those for whom some provision had been made; but none was made for *Benjamin*, who seems besides to have been an object of the testator's

confidence, since he had appointed him executor, and trustee for his sister. In this respect only, the decree appealed from is incorrect.

PER CURIAM.—Let the decree below be affirmed, as to so much of it by which the mode of distribution is pointed out, and reversed as to the exclusion of *Benjamin*. Let the costs of the Court below be paid out of the fund, and the costs of this Court by the Plaintiffs.

William Petty & Lavinia his wife
v.
Hezekiah Harmon.
} From Chatham.

Satisfaction of an open trust is not presumed from lapse of time, but a settlement between the trustee and *cestui que trust* changes the character of the trust, and subjects it to the presumption of satisfaction. Therefore where a settlement was made between an administrator and an infant distributee nearly of age, and not afterwards disaffirmed by the infant, it was held, that the lapse of twenty-two years raised the presumption of satisfaction.

Per HENDERSON, Judge, the case of *Falls* v. *Torrance*, was decided upon the ground that the trust was an open one, and never had been closed.

The Plaintiffs in their bill, which was filed in 1824, alleged that *William Dilliard* died in the year 1781, leaving the Plaintiff *Lavinia*, his only child, an infant of only three weeks—that administration upon his estate was committed to *Keziah* his widow, who afterwards intermarried with the Defendant—that *Dilliard* at his death was possessed of a female slave and of other personal estate—that the Defendant in right of his wife, administered his estate, sold the property except the slave, which he converted to his own use, and collected the debts, particularly a large one due from one *Thomas*.

It was then averred, that before the Plaintiff *Lavinia* arrived at full age, viz. in the year 1801, the Defendant *Harmon* and one *William Petty sen.* the grandfather

June 1828.

Petty v. Harmon.

of the Plaintiff *Lavinia*, with a view of making her half brothers and sisters, also grandchildren of *W. P. sen.* equal in point of property with the Plaintiff, fraudulently procured her to accept of two negroes, and give a release of all her claims upon the estate of her father—that *Keziah*, the widow of *Dilliard*, and the wife of the Defendant, was dead—and that the female slave had many children, who were still in the possession of the Defendant.

The bill then set forth the intermarriage of the Plaintiffs, and prayed a discovery of the number and names of the descendants of the slave of which *Dilliard* died possessed—that the release given in 1801 might be declared void, and for an account and distribution of the personal estate of the intestate.

The Defendant, in his answer, alleged that *Dilliard* never owned the slave mentioned in the bill, and insisted that she was only lent him by *William Petty, sen.* the father of his wife. He denied that he had ever received any thing from the estate of *Dilliard*, and that he ever knew, until within a short time, that *Keziah*, his wife, had administered; and averred, that he had always thought administration had been committed to her father *William Petty, sen.* He stated, that after his intermarriage with the widow of *Dilliard*, her father had told him there was some property of his, *Dilliard's*, to which Defendant and the Plaintiff *Lavinia* were entitled; that it consisted of money, and a debt due by one *Thomas*—and that as he, the father, was old and infirm, he suggested that the Defendant should take the control of the debt, which was in amount, about equal to the share of the estate to which the Defendant, in right of his wife, was entitled. That the Defendant acquiesed in the proposal, and the more readily, as he did not know that his wife, independently of her father, was entitled to any thing—that understanding *Thomas* to be insolvent, he had, for a trifling consideration in goods, assigned the debt to a merchant in the neighbourhood.

It was admitted, that the Defendant had possession of the slave mentioned in the bill, and of her increase; but insisted that he claimed them under an advancement made *Keziah*, after her intermarriage with the Defendant, by her father *William Petty*, the elder.

As to the release, it was alleged, that the Defendant feeling uneasy at some reports in the neighborhood respecting a gift of the slave by *William Petty, sen.* to *Dilliard*, had, as he then believed, on the day when the Plaintiff *Lavinia* came of age, but as it afterwards appeared, on the day when she was twenty years old, caused a meeting to be had at *W. P's. sen.* where the Plaintiff *Lavinia* then lived, at which were present the most respectable people in the neighborhood, where the whole matter was discussed, and when the Defendant and *William Petty, sen.* conveyed to the Plaintiff two negroes by way of advancement, and for the purpose of settling her claims to her father's estate—the Defendant insisted that these two negroes were much greater in value than the share of the Plaintiff *Lavinia* in the estate of her father, and that the settlement was liberal from the natural affection of the grandfather, and from the regard which the Defendant had to the Plaintiff *Lavinia*, who had been nurtured by him from her infancy—all fraud & concealment was denied and the transaction insisted to have been fair. The answer averred, that the Defendant's wife had died in the year 1820, & *William Petty sen.* in 1822, that the Plaintiff *Lavinia* came of age in 1802 & married in 1806, and lived in the neighborhood of the Defendant until the year 1811, during which time no complaint had ever been made of the settlement, and the Defendant prayed the benefit of any presumption which could arise from this lapse of time. The Defendant also alleged, that he had been in possession of the slave mentioned in the bill, and her increase, from the year 1784 up to the time of filing this

JUNE 1828.

Petty v. Harmon.

bill, claiming them as his own, and insisted upon any benefit he might derive under the statute of limitation.

The allegations of the answer were fully supported, in the opinion of the Court, by the testimony. It particularly appeared from the copy of the record of a suit against *Thomas*, that the execution against his bail was under the control of the merchant, to whom in his answer, the Defendant averred he had assigned the debt.

W. H. Haywood, for the Plaintiffs, referred to *Falls* v. *Torrance*, (2 *Hawks* 490—4 *Do.* 412.)

Manly, for the Defendant, cited *Ivey* v. *Rogers*, (*Ante* 58.)

HENDERSON, Judge.—It has been very impressively urged upon us, in a short and pithy argument, that this claim is not barred by lapse of time; and the case of *Falls* v. *Torrance*, is cited as in point. In that case, we considered the trust, as to the negroes, an open one; for it was very clearly shown, by documentary evidence, that they never were brought into account, because of an unfounded claim of the widow. Frequent recognitions of these facts were made during the whole of the period relied on, as furnishing evidence of a satisfaction. In this case, however, it does not appear that any part of the father's estate was not brought into account. As to the interest, that was necessarily passed on when the principal was; and although the Plaintiff being an infant, was not bound by the settlement made by her grandfather, yet she was of mature years, and knew that it had been made, was able to understand it, and communicate to her husband what had been done. Now, after waiting more than twenty-two years since she came of age, and she was twenty-four or five when she married, and after the death of her grandfather, who had a principal share in the settlement, nay, almost the sole management of it, this claim is preferred.

There is one circumstance which is strong in support of the Defendant's answer—it is *Thomas's* debt. He swears it was considered to be worth but little, *Thomas* being insolvent, and that he took it as such, and sold it for a small sum. The record filed as an exhibit, confirms him in this, for it appears that the judgment was collected from the *bail*. I think this is not an open trust; but that it was closed in 1801—at least that it then lost that character, notwithstanding the infancy of the Plaintiff. Her infancy, it is true, protected her from being bound by the settlement, but it did not prevent the character of the trust from being changed.

PER CURIAM.—Let the bill be dismissed with costs.

Jesse Kirby, ex'r. of Samuel Kirby
v.
Sally Dalton & others.
} From Rowan.

Where the vendee of lands received no title—but only a bond to make one upon the payment of the purchase-money, the dower of his wife in the land is not protected against the debt due the vendor for the purchase-money.—Is the wife entitled to dower at all? *Qu.*

The Plaintiff in his bill alleged, that his testator, in his lifetime, sold a valuable tract of land to one *Jonathan Dalton*, for the sum of six thousand dollars; that no title was given to *Dalton*—but the testator executed a bond to convey upon the payment of the purchase-money; that *Dalton* had made sundry payments on account of the purchase-money, and that a balance thereof was still due. The bill then stated, that *Dalton* was dead, and his estate insolvent; that the Plaintiff could not recover the balance of the purchase-money without a sale of the land; and the prayer was, that the lands might be sold, and the proceeds applied to the satisfaction of the debt due the Plaintiff.

June 1828.

Kirby v. Dalton.

The heirs of *Dalton*, who were made parties in their answer, insisted, that their ancestor had been ousted of part of the land, by older and better title, and claimed a reduction of the price on account thereof.

The Defendant *Sally*, the widow of the vendee, in her answer, averred, that dower in the premises had been assigned to her, and insisted, that so much thereof as was covered by it, was not liable to the debts of her husband.

The allegations above mentioned, were all supported by the proofs.

Nash, for the Plaintiff.

Devereux, for the Defendants.

HENDERSON, Judge.—I cannot perceive upon what grounds this bill can be resisted. The vendor retained the title, for the purpose of securing the payment of the purchase-money, and he has a right in this Court to have his contract specifically executed, which is the object of this bill. As to the claim which the widow sets up, of having her dower protected from this demand, it is equally unfounded. The dower, protected by law against the debts of the husband, is dower in the lands of the husband. This never was the land of the husband; or if it was, while in his hands, it was at all times subject to this debt. This claim is therefore above the husband's interest. The lands came to his hands, if they came at all, subject to it. There can be no pretence for the exemption.

I have considered this case, as if the widow was entitled to dower in her husband's equities, which this Court has more than once decided against. But if she was, she would take subject to a superior equity, and this is certainly one of that description.

As to that part of the answer which claims a deduction from the stipulated price, because the vendee was evicted from a part of the land by a superior title, it is

certainly good, and the extent of the loss must be enquired into.

PER CURIAM.—Direct an account to be taken of the purchase-money unpaid—and let the Master ascertain the value of the land from which the vendee has been evicted, in relation to the price given for the whole tract. Let him also ascertain the value at the time of the eviction, computing the interest on both valuations.

Burwell Simms
v.
Nathaniel Thompson and Winifred, his wife, } From Wake.

For the recovery of legacies, filial portions, and distributive shares, the County Courts are Courts of Equity, and have all the powers of such Courts. Upon proper cases, they may review or rehear their own decrees. But where a decree was made which disposed of the cause, it was held to be equivalent to an enrolment, and that they had no power, at a subsequent term, to rehear that cause.

A review cannot be had for mistakes in a decree, which might have been rectified by proper attention.

The petition, which was filed in the County Court, at February term, 1824, set forth, that the Defendant *Winifred*, with several others, who were distributees of *William Simms*, filed their petition at November term, 1820, against the Plaintiff, as administrator of said *William*, for distribution of his estate; that at February term, 1821, of the said Court, the Clerk was ordered to take an account of the administration of the Plaintiff—that according to this order, the parties appeared before the Clerk, when the account was taken, which was in every respect satisfactory to the Plaintiff—that, after the settlement, the Clerk handed to the Plaintiff some memoranda, as guides to him, in his payment to the distributees; that the Plaintiff then supposed these memoranda were incorporated in the account, and that the de-

June 1828.

Simms v. Thompson.

cree would be entered accordingly. But that he had learnt only within a few days, that the decree had been entered up for the whole distributive share of the Defendant *Winifred*, omitting sundry payments made her on account of it--and that she having intermarried with the other Defendant, he had sued out a *scire facias*, and was pressing an execution for the whole amount of the decree. The Plaintiff prayed that the original decree might be reviewed & corrected; and also for a rehearing.

The Defendants, in their answer, denied the existence of the errors alleged in the petition, and insisted, that if they existed, the Plaintiff was without remedy, the decree in the original cause being final—as it disposed of the cause, and even of the costs.

The original decree was filed with the answer, as an exhibit. It was entered at August sessions, 1822. By it, the shares due the several distributees were settled—the costs disposed of, and an execution awarded.

At February term, 1824, of the County Court, the Clerk was directed to take anew the accounts between the parties. By his report, it appeared, that the errors of which the Plaintiff complained existed, and the County Court made a decree for the Plaintiff, correcting the former decree, from which the Defendants appealed.

In the Superior Court, his honor Judge DANIEL, on the Fall Circuit of 1827, dismissed the petition, being of opinion, that the County Court had full power to rehear or review a decree, upon petition on a proper case, but that there had been a final decree in this cause, and that, in substance, the petition sought for a rehearing of it. Whereupon, the Plaintiff appealed.

This Court desired *Devereux*, who appeared for the Plaintiff, to confine his observations, to the question, whether this was a proper case, either for a rehearing or a review. Upon which, he contended that it was. He insisted that decrees upon bills for an account never were enrolled, and the reason was, that if they were, the

hands of the Court would be tied up, so that they could not correct any mistakes which might be made. That if this rule was necessary in the English Chancery, the same, or some one similar to it, should be adopted in this State, where the Courts were limited in the duration of their terms, and where business was frequently concluded in haste. He contended, that all the rules and practice of the Courts of Chancery, showed an extreme caution upon the subject of mistakes in accounts. He cited *Staunton* v. *Oldham* (2 *Atk.* 382.) *Tothill's Proceedings* 42. *Beame's Orders* 3. *Cooper's Equity Pleading* 90. 1 *Newland's Practice* 38. *Eyler* v. *Ward* (*Dickins* 58) *Yow* v. *Townsend* (*Do.* 59) *Wallis* v. *Thomas* (7 *Ves.* 292) *Pickard* v. *Matthews* (*Do.* 293.)

He contended also, that this petition might be considered as a petition for a review; and that a mistake not known to exist at the time the decree was entered, was precisely, in principle, like evidence newly discovered, which was clearly ground for a review; and on this point was cited *Patterson* v. *Slaughter* (*Ambler* 293.)

W. H. Haywood, for the Defendant.—The County Court cannot *review* or *rehear* decrees pronounced in that Court in cases of petition. Such power is not *expressly* created by the act of assembly, which confer a right in the Court to hear causes upon petition. The rules of Chancery are not made the rules of the County Court, but the manner of proceeding is *pointed* out by the Legislature, which differs from Chancery in important particulars. 1. A cause may be heard at the same Court which sets it down for hearing, and in some degree summarily, and without regard to form. 2. The Defendant may refuse to answer, and no process for *contempt* issues, but a judgment *pro confesso* only. 3. The decrees of the Court are to be enforced by writ of *fi. fa.* or *ca. sa.* and not by the process of *attachment*. (*Revisal pages* 120, 218.) There is therefore no reason to *imply*

JUNE 1828.

Simms v. Thompson.

that the Legislature intended to establish the rules of Chancery for the guidance of the County Court.

The County Court has only a *special limited* jurisdiction by petition, for the recovery of legacies, filial portion and distributive shares of intestates estates, against guardians and administrators—their decrees are conclusive in the Court which pronounces them—the jurisdiction was given only to save in such cases the expense and delay of a suit in Chancery—to protect either party from injury by errors in *law* or *fact*, a right to appeal is secured by the act of assembly—when the decree is pronounced and the Court has adjourned, the parties are no longer before that tribunal, and no process is provided by which they can *supercede* such decree or again bring the parties before them. (*Rev.* 120, 219, 312.)

The decrees of the County Court may be *enjoined* in Equity for the very grounds laid in this petition. (*Holding* v. *Holding*, 1 *Murphey* 10.)

That the Legislature intended to confer no other powers than those which by the acts are specially enumerated, is manifest from the *proviso* in the act of 1762, that nothing therein should abridge or restrain the powers of the Court of Chancery. (*Revisal* 120 and 219.)

The reasons for which bills to *review* and petition to *rehear* are allowed in Chancery, do not apply in any manner to a case like this—either party might have appealed, and the case would be tried *de novo*. (*Rev. p.* 312, 219.) Upon proper grounds, the Court of Chancery would enjoin and issue a writ of *certiorari*. (1 *Mur.* 10—3 *Mur.* 159,) and to allow the introduction of all the strict rules of Chancery in the County Court, would produce incalculable mischief to the repose and quiet of families.

This question has been settled in this Court in the case of *Kennon & wife* v. *Branson*, (*Ante* 64,) not in *terms*, but in *substance*.

2. But concede the power to *review* or to *rehear*, it will at least be required that the grounds of the application shall be such as would move a Court of Chancery to act. And in that Court, this decree could not be *reheard*, because it was *final* and *enrolled* before this petition was filed. (2 *Maddox*, 370—1 *Newland's Chancery* 360.)

It was unquestionably *final*, for it disposes of the whole controversy, and dismisses the parties from the Court—either party might have taken an appeal—even the costs are adjudged to be paid.

It was *enrolled*, or that was done, which, in our practice, is tantamount to enrolment, before this petition was filed—to-wit: the decree was recorded, and the Court had adjourned. (*Kenan's Ex'r.* v. *Williamson*, 1 *Hayw. Rep.*—*Jones* v. *Zollicoffer*, 1 *Car. Law Rep.* 376—*Ibid. Term Rep. N. C.* 21.)

The decree could not be *reviewed*—for this petition does not ask a *review*—and it does not disclose matter for a Bill of Review in Chancery, which must be for error in law apparent—or new matter discovered. (1 *Newland's Ch.* 368—2 *Maddox Ch.* 408.)

The cases cited by the Counsel do not establish the proposition for which he contends, that a "*decree upon an account is never enrolled.*" These cases only prove that a decree *for* an account, viz. an order in the cause directing that the Defendant *shall account*, is never enrolled. But after the account is taken and confirmed, and decree final thereon made, the whole is enrolled, and cannot after be *re-heard*—And the reason why decrees to account are not enrolled, is, that the Court may reserve the right of instructions to the Master further, and, if need be, different from those originally furnished, in taking the account. This is evident from the case in *Dickens*, and is abundantly established by a reference to the numerous precedents of enrolled decrees pronounced

June 1828.

Simms v. Thompson.

upon accounts collected in *Harrison's* and *Newland's Chancery*.

In fine, we may view this cause in every point, and it still presents itself as nothing more or less, than a petition in the nature of an original Bill in Chancery, for relief from an alleged mistake or surprize in the trial of the first suit in the County Court.

Taylor, Chief-Justice.—The expense and delay incident to an application to Chancery, for legacies or distribution, was too obvious a mischief not to call for a remedy, more especially when there was but one Court of that description existing in the then Colony, and a great proportion of the rights sought for, were comparatively of small amount. This remedy is applied by the act of 1762, and the mode of it is, by investing the Superior and County Courts with equity jurisdiction on these subjects. To insure a speedy trial of such causes, certain rules were prescribed by the Legislature, and these must undoubtedly be observed, as far as they extend; but where a case arises, that is not provided for by these rules, recourse must necessarily be had to the practice of a Court of Chancery.

The jurisdictions are concurrent on the subjects contemplated, but in the inferior Courts, means are adopted to accelerate the trial of causes. To construe the powers conferred on these Courts, as an exclusion of others, would be to deny the right of awarding a new trial, or of granting an appeal, neither of which are provided for by the law, though they have been constantly exercised, as well as many others appertaining to the equity jurisdiction. Nor can any reason be imagined, which justifies the propriety of refusing to rehear or review a decree in the County Court, whilst a decree made in the Superior Court is subject to this revision. It never could have been the intent of the Legislature, that an imperfect degree of justice should be administered, when

the decree was rendered in the County Court, when they are cautious to secure a full measure of it in the Superior Court, by guarding against any construction which may tend to abridge the powers of the latter, in expressly providing that the powers of the Court of Chancery shall not be limited as to such subjects. The whole spirit and object of the act require a construction which shall put those Courts fully into possession of the means of doing justice, when they are applied to; otherwise they will cease to answer the purposes of their establishment, for they cannot "proceed to hear and determine the same, according as the matter in equity and law shall appear to them, without regard to form," unless they can also rehear and review the same, upon a proper case being made.

Having no doubt as to the authority of the Court to rehear and review, it is necessary to enquire whether this forms a proper case for either.

The only two grounds upon which a bill of review can be maintained, are, 1st, for error apparent on the face of the decree; 2d, for new matter discovered since. The subject of complaint made in this petition is, that the Clerk showed the petitioner a statement, according to which he understood the account was to be settled; but no error appears on the face of the decree, and the ground of complaint was known to the petitioner, before the decree was entered. He alleges, that when the decree was made, he thought the account was settled, in the manner the Clerk told him it would be, but an ordinary degree of vigilance would have saved him from this mistake.

It is clear that after the enrolment of a decree, the cause cannot be reheard, and although we have no regular enrolment in this State, according to the practice in Chancery, yet it has been uniformly considered, that after the term at which the decree was heard, if it was final, and the parties out of Court, such was equivalent to enrolment. Nor does any difference exist between de-

June 1828.

Simms v. Thompson.

crees on accounts and others; for the cases only show, that decrees to account are not enrolled, not that the decree made after the account comes in is not enrolled.—This is plain from the reason given in the book; the first decree is not enrolled because it ties up the hands of the Court from relieving, if there should have been any defect in the directions of the decree. But after the account is returned by the Master, and the parties have an opportunity of excepting, there can be no reason why the final decree should not be enrolled; more especially as according to Lord *Bacon's* second ordinance, an error in calculation, (miscasting) may be rectified without a bill of review.

PER CURIAM.—Let the decree below dismissing the petition, be affirmed.

June 1828.

Aaron L. Gomez,
v.
Aaron Lazarus & others. } From Cumberland.

A bill was accepted for the accommodation of the drawer, and this fact was known to the endorser, who when his endorsement was made, received from the drawer a bond and mortgage, conditioned to be void if he should be indemnified against that, and any subsequent endorsement. The drawer then conveyed the mortgaged premises, in trust, to secure all his debts, with instructions in the deed, to his trustee to pay such debts first "as may be endorsed by the said" endorser. After this conveyance, the bill being protested, was taken up by giving the holder, the note of the drawer, with the acceptor and endorser, as sureties, which was paid by the acceptor, who procured an assignment of all the securities in the hands of the endorser and the holder. *It was held,*

First, that there being no contract, whereby the endorser and acceptor agreed to become co-sureties, the latter had no right to contribution from the former.

Second, that the endorser being liable only upon the default of the acceptor, the latter could not be subrogated to the rights which the holder had against the former.

Third, that the mortgage being made for the personal indemnity of the endorser only, and not for the security of the *debt*, the acceptor had no right to pursue the fund, and that the endorser being indemnified by the acceptor's payment the mortgage was *functus officio*.

Fourth, that a mortgage to secure subsequent endorsements rested merely in contract, and was available for those only, which were made while the property remained under the control of the mortgagor.

The pleadings and proofs in this cause were exceedingly voluminous; it is believed that the following is a correct statement of the facts, which were either admitted or proved:

Jacob Levy, a resident of Fayetteville, in this State, in April, 1819, procured the Plaintiff, a Commission Merchant in New-York, with whom he was in habits of business, to accept his bill of exchange for $5000, payable to one *Clark*, whose endorsement, as well as the Plaintiff's acceptance, was for the accommodation of

JUNE 1828.

Gomez v. Lazarus.

Levy. There was no communication between the Plaintiff and *Clark* respecting their liabilities for *Levy*.—*Clark* knew that the Plaintiff's acceptance was for *Levy's* accommodation; and *Levy* informed him, that he should consign to the Plaintiff produce to meet the bill. The bill was discounted at the Bank of Cape Fear, for the accommodation of *Levy*. When it was drawn, *Levy* executed a bond to *Clark*, in the penalty of $15,000, with a condition to be void in case *Levy* should indemnify him against loss, by means of any endorsements or suretyships. To secure this bond, *Levy*, on the same day, executed a mortgage upon his property in the town of Fayetteville; which deed was not recorded until August, 1822.

In July, 1819, another bill was drawn, similar to the first, and in renewal of it, when *Levy* executed another bond to *Clark*, with a condition to be void in case *Levy* should indemnify him against all liabilities which *Clark* had then, or might thereafter incur, for his accommodation. To secure this bond, *Levy* executed, on the same day, a mortgage on his property in Wilmington, which mortgage never has been recorded.

In November, 1819, *Levy* being largely indebted to the Bank of Cape-Fear, the State Bank, and the Bank of the United States, by promissory notes, to which the Defendant *Lazarus*, *Clark*, and several others, were sureties, made a general assignment of his estate, including the property mortgaged to *Clark* by the two deeds of April and July of that year, to *Lazarus* and one *McRae*, for the indemnity of his endorsers & sureties, *pari passu*. *Lazarus* and *McRae*, at the time of the assignment, had notice of the two mortgages to *Clark*, & the last clause of the assignment was as follows: "And whereas *John Clark, Esq.* hath a lien upon part of the property herein conveyed, for his endorsement made for the said *Jacob Levy*, it is further understood, agreed, covenanted and granted, and the Trustees aforementioned are hereby directed, in order to extinguish said claim, first fully to

pay and satisfy, out of the proceeds of the sale or sales aforesaid, so much of the debt of the said *Jacob Levy*, in the Banks aforesaid, as may be endorsed by the said *John Clark*."

The acceptance by the Plaintiff of *Levy's* draft in favor of *Clark*, was renewed by re-drawings, until February, 1820, when it was protested, and the holder, the Bank of Cape Fear, then received from *Levy*, the Plaintiff, and *Clark*, their joint & several promissory note, for $5,200, to secure the principal, and damages on it. *Levy* and *Clark* becoming insolvent, suit was brought upon this note against the Plaintiff, in New-York, where it was finally recovered of him, under a decree of the Court of Chancery, by which the holders were directed to assign to the Plaintiff all the interest which they had in the trust fund, created by the deed of November, 1819, to *Lazarus* and *McRae*, so far as it extended to the note of $5,200. An assignment was executed, according to this decree, by the Bank of Cape-Fear, in June, 1824; and in January, 1825, *Clark* also assigned to the Plaintiff all the right which he had to the two mortgages made to him by *Levy*, and also, all his right under the assignment made to *Lazarus* and *McRae*, so far as the latter extended to indemnify him against his endorsement of the bill upon the Plaintiff, or his suretyship for the note of $5,200.

The Bank of the United States, the State Bank, and the Bank of Cape-Fear, together with *Levy*, *Clark*, *Lazarus*, *McRae*, and all the sureties of *Levy* interested in the assignment, were made Defendants.

The Plaintiff insisted that he was, both by the rules of a Court of Equity, and also by the assignments of the Bank of Cape-Fear and of *Clark*, entitled to the benefit of the two morgages made to *Clark*; that it was the object and intention of *Levy*, in his assignment of November, 1819, to preserve this right to the Plaintiff, as well as to *Clark*, and that if it was not preserved and secured

June 1838.

Gomez v. Lazarus.

by the assignment, it was by reason of a mistake. The bill prayed that any mistakes or omissions might be corrected; that the Plaintiff might be decreed to stand in the place of *Clark* and the Bank of Cape Fear, in respect to their claim upon the trust fund, on account of the debt which he had paid, and for an account of that fund, and payment of the money he had paid as surety for *Levy*.

The cause was argued at the last term, and held by the Court under advisement until the present.

Gaston, for the Plaintiff.—The mortgage by *Levy* to *Clark* was incorporated with, and made part of, the deed to *Lazarus* and *McRae*. Whatever right, therefore, *Clark* had under the mortgage, he has under the deed. The mortgage protected him from the payment of this debt, and the deed must be held to do the same. To the argument that the joint note was given after the deed to *Lazarus* and *McRae* was delivered, and that the deed annulled the mortgage as to subsequent endorsements, it is admitted that the mortgage could not avail to protect a perfectly new endorsement. But here the endorsement was given to secure the old debt, that was in existence when the deed to *Lazarus* and *McRae* was executed, and this Court will look at the substance of the transaction, viz. the renewal of the debt, only making the form of security different.

The facts then present the ordinary case of a payment by a surety. Can it be denied that he has a right to all funds created for the payment of the debt, especially when the debt was incurred upon the credit of that fund? Generally, and I may say universally, whenever property is pledged by a debtor to pay his own debt, any person who pays it may resort to that fund for indemnity. (*Hays* v. *Ward*, 4 *John. Chan. Rep.* 123.—1 *Eq. Cas. Ab.* 93. *Pl.* 5.)

From the case of *Daniel* v. *McRae*, (2 *Hawks*, 590,) it might well be contended, that the parties to the bill originally drawn, viz. *Clark* and the Plaintiff, were co-sureties: but waiving that question, and admitting that both at law and in this Court, *Clark*, as a surety, was supplemental to the Plaintiff, and that the former had a right to full indemnity from the latter—then the case is, that between the Plaintiff and *Clark*, the Plaintiff is a principal debtor; and has not the surety a right to all the indemnities which exist in the hands of the creditor?

That the Plaintiff is a surety, notwithstanding the form of his engagement, is admitted. Suppose, then, the holder had taken a mortgage for his indemnity—the case of *Hays* v. *Ward* proves that he is to hold this as a trustee for the Plaintiff: and can it be different when one who stands on middle ground—who is accountable to the holder, but has a remedy over upon the Plaintiff, should not hold all his securities for the benefit of him against whom he has a remedy? (*Ex parte Rushforth*, 10 *Ves.* 409.)

Hogg, for the Defendants.—The parties to the deed of trust are *Levy*, *McRae* and *Lazarus*. The deed is executed to countersecure *Lazarus*, *Clark*, and other securities of *Levy*, upon certain negotiated papers set forth in the deed. *John Clark* had prior liens upon part of the property, not duly registered, and void at law—their validity in equity, depending on a question to be decided in a Court of Chancery, as to notice—*Levy*, to settle all controversy on the subject of *Clark's* priority, inserted in the deed between himself and *Lazarus*, a covenant to the effect following:

"And whereas *John Clark* hath a lien upon part of the "property herein conveyed for his endorsement, made "for *J. Levy*, it is further understood and covenanted, "&c. and the trustees are hereby directed, in order to "extinguish said claim, first fully to pay and satisfy out

June 1828.

Gomez v. Lazarus.

"of the proceeds of the sale, so much of the debt of said "*Levy*, as may be endorsed by said *John Clark*."

Gomez is not entitled on the deed directly, and without substitution. The deed is not made for the benefit of any person except *Clark*, and the sureties mentioned. *Clark's* priority is to be preserved, and his security extended to *all* the property instead of a *part*, and subject to that priority, the other sureties are to be secured by the residue of the property. Neither the Banks nor *Gomez* are objects of favour with *Levy*, nor *named* in his stipulation with *Lazarus*; not being named in the covenant, nor described, they cannot take for themselves directly and without substitution. The meaning of the covenant is, to postpone the sureties named in the deed to *Clark*—*Clark* was the favoured surety, and the *debts* on which he was bound, were favoured *only* so far as it was necessary to make him safe, and no farther. If *Gomez* had executed a note negotiable in Bank, for his own benefit, and *Levy* had signed it for his accommodation, and *Clark* had endorsed it for the accommodation of both, in terms set forth in the covenant, it would have been the debt of *Levy*, and endorsed by *Clark*. Yet neither the Bank nor *Clark* could have compelled the trustees, *Lazarus* and *McRae*, to pay that debt, until the property of *Gomez* was exhausted, because not until then, would it be necessary for *Clark's* indemnity. But if *Gomez* could not pay it, it would be necessary to satisfy it, to protect *Clark*, and the trustees must pay it. It is the same thing whether the liability of *Gomez* precede that of *Clark*: because *Gomez* is the principal debtor, and *Levy* his surety and *Clark* the surety of both; in either case, *Gomez* comes before *Clark*, and *Clark* is never liable, till *Gomez* fails. The covenant gives *Clark* only the preference of the other sureties mentioned, and subject to such liability, prefers them to all others. The debt is to be paid to the Bank out of the property, and by the trustees, when *Clark* is liable, and not before; *Clark* had two securities to

look to, *Gomez* the acceptor, and the trustees. He has suffered the acceptor to pay, and so he is safe. The acceptor makes application to the trustees, and insists they received the property in trust for *his benefit*, and to indemnify him. They answer, he is not named in the deed, and upon the whole deed, and upon the expressions in the covenant, that they were only to countersecure *John Clark* for his endorsement—*when he had suffered for his endorsement.* That subject to his security, they held the property in trust for the other sureties, who were equally meritorious creditors with *Gomez* (supposing him to be a surety) and had a special lien on the property, discharged from the demands of all persons except *John Clark*, and those who could be subrogated to his rights, and that *Gomez* was neither the surety of *Clark*, nor his co-surety, but liable before him at law and in equity, and therefore cannot be subrogated to him. If the construction be correct, that the debt of *Gomez* is to be paid at all events, then, if the property in the hands of the trustees be insufficient to pay all the endorsements of *Clark* mentioned in the deed, and those out of it, *Gomez* will be upon an equality with *Clark*, and will receive from the trustees as against *Clark*, such a part of the proceeds as will be in the ratio of his (*Gomez's*) acceptance to the whole sum for which *Clark* is liable as endorser. This surely never could have been the intent of *Levy* or *Clark*; a construction leading to such a consequence, should not be made by the Court, except upon particular and insurmountable expressions, which would controul the general intent of the covenant, namely, *Clark's indemnity.* The particular expressions, and the general intent of the covenant, to indemnify *Clark* to the extent of his liability for his endorsement, and no further, stand together. The covenant having provided for *Clark's* indemnity, can be extended no farther, without prejudice to him, and the other persons, for whose benefit the deed was made, and will at their expense and loss, save *Go-*

June 1826.

Gomez v. Lewis.

and surety; and, therefore, he, as surety, was obliged to permit the Bank to have the use of any security he might have or acquire, and the Bank was obliged to assign to him any additional security they might get: the duty between them as principal and surety, being reciprocal, and each being obliged, according to a rule of equity, to afford the other any security, either personal or on property, collateral or direct, which might be acquired for the payment of the debt.

By our understanding of *Gomez's* engagement, he voluntarily, at the request of *Levy*, put his name on the paper, and became bound to pay the Bank, in exoneration and discharge of *Clark*, both at law and in equity, and thus, by his written undertaking, came in the place of the principal debtor to the Bank and to *Clark*, who was not a co-surety with him, but supplemental only. This is indisputable at law, nor does the mere fact that he was a volunteer, and *accepted* for the accommodation of *Levy*, alter the case in equity. Had there been a treaty between *Gomez* and *Clark*, or had they both signed the negotiable paper for the accommodation of *Levy*, without treaty, before it was offered for discount, and negotiated, there might have been some ground, as they were both sureties for *Levy*, to consider them co-sureties in Equity. But as they were bound for different acts, it is submitted that even upon this state of the proof, *Clark* must have been in equity a supplemental surety only, and not a co-surety of *Gomez*. Nothing else than evidence *aliunde*, that in fact they had agreed to be reciprocally responsible to each other, notwithstanding the form of the instrument chosen, could make them in equity or law co-sureties. In the present case, there is no such evidence. The bill was negotiated in *Clark's* name, and the Bank afterwards procured the acceptance of *Gomez*, for their own benefit, and, by inference of law, for that of *Clark*, who ceased to be the primary surety to the Bank, and became secondary and supplemental only;

the acceptor being, as to him, the principal debtor. If the bill had been protested for non-acceptance, and the Bank had sued *Levy*, and held him to bail, and fixed the bail with the payment of their judgment, and then collected the money of *Clark*, he would have had a right to resort to the bail, and the Bank must have assigned to him their judgment against the bail; because the bail comes in the place of *Levy*, the principal debtor.—*So does the acceptor, Gomex.* (*11 Vesey, junior*, 22.—*Parsons* v. *Pridock*, (*2 Vernon*, 608.) The case of *Tentrum* v. *Powell*, (*5th Taunton*, 192) shews that the acceptor is principal as to all the parties, and that even if he accepts *for accommodation*, and not upon funds, that he will not be considered, *as to the holder*, a surety.

Such were the rights of the parties at the execution of the deed of trust. In this case it is not material to consider whether the trustees were affected with notice or not, for *Clark* is a *cestui que trust* in the deed of November, 1819, and he is a party to this suit, and the Plaintiff avers, (as the truth is) that *Clark* is a party to the trust deed, and rests his claim to relief upon *Clark's* right under it. Whatever rights, therefore, he is supposed to have under his mortgages of April and of July, 1819, he must be content to have them as they are qualified and restrained by the deed of November, 1819, to which he is a party. By the former deeds of mortgage, *Clark* was counter-secured as to all the endorsements *then made, or to be made*; by the deed of trust, he was declared to have a lien upon the property therein conveyed, and the trustees were directed to indemnify him, by paying so much of *Levy's* debt at the Banks (who are parties to the deed,) as was (then) endorsed by *Clark*. Now, whether the deeds of mortgage were void, as against the deed of trust, or good in equity against it, yet by *this* deed, by the very words inserted for *Clark's* benefit, his power to enter into any new security is annulled, and the property mortgaged

June 1833.

Gomez & Lawrie.

to him, by his consent, conveyed to others, subject to such endorsements of his as were then in Bank.

Now not waiving, but insisting that under the deeds of mortgage and trust, *Clark* was protected against *endorsements* only, and not against any other form of suretyship—yet if it be correct, according to the former part of this argument, than upon the bills accepted by *Gomez* he was liable primarily, and *Clark* only secondarily, and in aid of him, in November, 1819, when the deed of trust was executed; then after that date, the trustees in the deed were bound only to protect *Clark*, according to his liabilities, as they then existed, and not otherwise. If he was secondarily liable, they were bound to protect him, not by paying the debt, but by causing *Gomez* to pay it, or by paying it themselves. If they paid it, they could claim an assignment of the rights of the Bank, against *Gomez*. *Clark*, by no act of his after November, 1819, either in collusion with *Gomez*, or without it, could make the trust fund primarily liable, where it was before that time, liable only in the second degree.—Therefore his note of February, 1820, whereby he has become the co-surety of *Gomez*, cannot have that effect, and if *Gomez* has paid off this note, whatever may be his rights against *Clark* personally, yet neither he nor *Clark* can bind the trustees to a new, and different obligation from that imposed upon them by the deed of November, 1819. The rights of all parties are ascertained and fixed by that deed, and as respects *Clark's* liability on that deed, it was secondary, and not primary, by endorsement, and not by making a note.—*Clark* has no claim for damages, he has sustained by entering into a new security, and into an engagement different from that by which he was bound in November, 1819, and from which only, the trustees by the deed of that date, were required to save him harmless. *Clark's* claim certainly derives no additional force when urged by the Plaintiff, as there can be no reason assigned

wherefore *Clark* should have changed his responsibility from indorser to that of co-surety, unless he thereby hoped and intended to give the Plaintiff an undue preference over the other sureties of *Levy* for his accommodation, and who by their diligence, had acquired a lien on *Levy's* property subject only to the responsibility of *Clark*, and not of *Gomez*. The deed must be construed as a countersecurity for *Clark*, for suretyships antecedent to the deed. For if he were at liberty to join *Levy* in new securities without limits, he could pledge the trust property to its value, and the trust deed would be nugatory as to *Lazarus* and the other *cestui que trusts* named, and would enure exclusively for the benefit of *Clark*, which is manifestly against the intention of *Levy*.

HENDERSON, Judge.—*Levy* and *Clark* stand bound, in equal degree to the Bank, that *Gomez* should accept and pay the bill of the former. The discount, being solely for the benefit of *Levy*, as between him and *Clark*, he was the principal debtor. *Gomez*, by his acceptance, became a principal debtor as to *Clark* and the Bank; but his acceptance being for the accommodation of *Levy*, as between *Levy* and himself, he was only a surety. These facts were all known to *Clark*, at the time of his endorsement, with the further information, that *Gomez* accepted, or would accept, in confidence that *Levy* would consign property to him before the maturity of the bill, to meet the acceptance; and that he, *Gomez*, transacted business as a Commission Merchant in New-York, to whom *Levy* was in the habit of making large consignments.—By a bond and mortgage, a fund is provided for the indemnity of *Clark*, at the time of his endorsement. The whole of *Levy's* property is afterwards *bona fide*, and upon full consideration, conveyed to *Lazarus* and *McRae*, with notice of the mortgage to *Clark*. The mortgage has not been registered. In the deed to *Lazarus* and *McRae*, there is this clause: "And whereas *John Clark*

June 1828.

Gomez v. Lazarus.

hath a lien on part of the property herein conveyed, for his endorsement made for the said *Jocob Levy*, it is further understood, agreed, covenanted and granted, and the said Trustees are hereby directed, in order to extinguish said claim, first fully to pay and satisfy, out of the proceeds of the sale or sales aforesaid, so much of the debt of the said *Jacob* with the Banks aforesaid, (meaning among others the Bank of Cape-Fear,) as may be endorsed by the said *John Clark*." After one or more re-drawings by *Levy* on *Gomez*, endorsed by *Clark*, and after the execution of the deed from *Levy* to *Lazarus* and *McRae*, *Levy*, with *Gomez* and *Clark* as his sureties, gave a joint note to the Bank of Cape-Fear, the holder of the bill, or which is the same thing, a similar one drawn in renewal of it, including interest and damages. *Levy* and *Clark* being insolvent, *Gomez* has paid the whole of this note. In the mortgage to *Clark*, the mortgaged property is declared to be liable to any future, or other endorsement, which *Clark* may make for *Levy*, and for any endorsement which he may make for their renewals, according to the practice of Banks. *Gomez*, by this bill, seeks the benefit of the fund created for *Clark's* indemnity, and has obtained an assignment from him, and also one from the Bank of Cape-Fear, of all their interest in the trust premises, for and on account of the bill or note abovementioned.

There is no *agreement* made between *Clark* and *Gomez* to change the order of their liability, appearing upon the face of the transaction. Upon it, *Gomez* stands prior in obligation to *Clark*, for *Clark's* liability was to arise only upon his default. Standing in this relation, he cannot call upon *Clark* to contribute as a co-surety. In order the better to understand the claim of *Gomez* to the fund provided for the indemnity of *Clark*, we will consider it as created by a stranger, and not by *Levy*, the principal debtor. *Gomez* could not reach it on the ground of equality between *Clark* and himself, for he

stands, as we have seen, prior in obligation to *Clark*. Neither can he claim this fund upon being subrogated to the rights of the creditor, the Bank of Cape-Fear, for the Bank, upon receiving payment from him, is bound to assign all its obligations and facilities for enforcing payment from those who stand prior and equal in obligation to him, not from those who stand posterior to him; and, I would say, not from those who stand in equal or prior degree, unless the fund came from the principal debtor. For I think, in that case, it is purely personal, and cannot be communicated. But as this fund came from *Levy*, the principal debtor, it is very justly thought to be more accessible to his sureties, and if it still remained the property of the principal debtor, this Court would lend its aid to reach it, and would remove all obstructions out of the way, and place it within the power of the suffering surety. I am almost prepared to say, that where the principal debtor creates a fund for the indemnity of a primary surety, one not a bare certificator, as he is called in the civil law, (such I think *Clark* to be) any surety who stands in equal or posterior degree, may pursue the fund in the hands of any person, who comes to it with notice. For the principal debtor is bound to provide equally for all his sureties; with him there is no prior or posterior; and when he communicates a benefit to one, his relationship makes it common to all standing in equal degree. *Commune periculum, una salus.*

The co-surety who attempts, at the time, or after the obligation is created, privately to provide for himself, from the funds of the common principal, acts contrary to good faith, as he thereby diminishes the funds, on which they all rely for their common safety.—And besides, it would tend to weaken his exertions to the end in which all have an interest. But to extend this to a prior against a posterior surety, is connecting together those whose situations are different, and inferring similar rights from dissimilar obligations. It is

June 1838.

Gomez v. Lazarus.

restricting too much that right of self-preference or self-security, which all human laws permit, if we do not infringe upon those of others; and it is not considered an infringement of them, to procure for ourselves a satisfaction or security for our debts, although we may leave our debtor without the means of satisfying his other creditors, whose debts may be as meritorious as our own. Subjecting this fund (I speak of it as provided for *Clark's* indemnity, and not for the payment of the debt, which I shall notice presently,) to the claim of *Gomez*, would be saying, *in effect*, that the bare act of becoming surety creates a *lien* in behalf of the surety, upon the property of the principal debtor. It cannot be reached through the medium of *Clark*, for it was to be used by him, only in the reverse of the facts which have happened, to wit, the failure of *Gomez* to pay; whereby *Clark's* guarantee to the Bank would be violated. Nor can it be reached through the medium of the Bank, for similar reasons. The Bank could not call on *Clark*, and consequently could not call for the fund provided for him, but in the like event, the failure of *Gomez*. The fund, therefore, remained the property of *Levy*, and subject to be transferred to any person, liable however, in the hands of an assignee, to indemnify *Clark*, or any person who had recourse against him, for any damage which they might sustain from the default of *Gomez*. I have viewed this case as it stood to the fund, when the trust deed was executed to *Lazarus* and *McRae*. After which *Levy's* dominion over the property entirely ceased, and with it the efficacy of that part of the original mortgage to *Clark*, to secure him against future endorsements; for it rested in agreement, and grew out of his dominion over his property. The loss of dominion did not affect endorsements made afterwards, for prior debts. Considering this, therefore, as a fund set apart for the indemnity of *Clark*, *Gomez* can have no claim to it.

But it is said, that it is set apart not only for the indemnity of *Clark, but that it is specifically appropriated to the payment of this debt.* If so, most certainly he who pays the debt has, in this Court, a right to be reimbursed out of the fund. For the principal debtor substituted it for himself, and he who can claim remuneration from him, can claim it from the fund. They are as it were identified. But after much reflection, and some doubts upon the subject, I think that the fund was provided and set apart for the indemnity of *Clark* only, and not for the payment of the debt, otherwise than as a mean of saving *Clark* harmless from his endorsement, because from the recitals in the deed providing it, it appears that it is substituted for the unregistered mortgage and bond to *Clark*, which provided for his personal indemnity only, and not for the payment of the debt. And the words, "extinguish such claim," and "fully to pay so much of the debt of said *Jacob Levy* with said Banks, as may be endorsed by the said *Clark*," must be understood as directed in reference to that object, to-wit, the payment of that debt, should *Clark* be compelled to pay it, and not simply the payment of the debt, without regard to that object. This construction is much strengthened from the fact, that personal indemnity, and not the payment of the debts generally of *Levy*, was the object of the deed. From the operation of it, it is therefore fair to strike out (or rather not to include within it) such debts as the person intended to be secured, should not be compelled to pay. As to the ground, that it was intended to protect *Gomez* as well as *Clark*, and that it was left out of the deed by inadvertence or mistake, the evidence does not support the charge. It does not appear that the parties intended any thing but what they have done.

HALL, Judge.—If *Gomez* and *Clark* had agreed to become sureties for *Levy*, and with that view, *Clark* had endorsed, and *Gomez* had accepted the bill of ex-

June 1828.

Gomez v. Lazarus.

change, when they afterwards give the note, on which a recovery was had against *Gomez*, in New-York, I think they should be considered as sureties for the debt which that note was given to discharge, and consequently that any indemnity which had been taken by *Clark*, to secure him against loss, should extend to *Gomez*.

But if *Gomez*, without any agreement or understanding with *Clark* to become *Levy's* surety, accepted the bill of exchange, he thereby became debtor to the Bank, and *Clark* was only bound as endorser. It followed that if *Gomez* had paid the debt, *Clark* was discharged, for he was only bound to pay, if *Gomez* did not.

Afterwards, when *Clark* and *Gomez* signed the note of *Levy* as sureties, *Gomez* was thereby released from his liability as acceptor, and stood as a co-surety with *Clark*, and as the latter had secured himself against loss, by the mortgage which *Levy* had made to him, *Gomez* had a right to be indemnified from the same security. This would be the case, if the rights of other persons did not interfere.

When *Clark* stood as endorser on the last bill of exchange, the deed of trust was executed to *McRae* and *Lazarus*, for the same property which *Levy* had mortgaged to *Clark*; so that *Clark* could only expect to be indemnified for such endorsements, as he had made for *Levy*, but not for any liabilities, which he might incur *after that time*. I have no idea that it was intended, nor do I think that the terms of the deed justify the belief, that the parties to it, intended to secure the payment of the *debt* due upon the bill of exchange, on which *Clark* was endorser, but only intended to secure *Clark* against his endorsement. If there had been a new bill of exchange drawn, perhaps the liability of the parties would not be altered. But when the note was given, they were so far altered, that *Clark* became a principal to the Bank with *Gomez*, and the liability of *Gomez* as acceptor, was discharged. In this respect, *Clark* acted upon his own

responsibility, and of course could not expect to be remunerated from *Levy's* mortgage to him, in case he had been compelled to discharge that note. His lien upon that mortgage for future endorsements, was terminated by *Levy's* deed to *McRae & Lazarus*; of course he could not, by his assignment of the mortgage to *Gomez*, convey any right which he himself did not possess.

I think, as it does not appear that *Clark* and *Gomez* by any agreement or understanding between them, stood as co-sureties for *Levy* on the bills of exchange; that although the mortgage from *Levy* to *Clark* secured the latter, on any endorsements he had made, or liabilities he had incurred for *Levy*, before the date of the deed of trust to *McRae* and *Lazarus*, it became inoperative, after the creation of that trust, as to any endorsements, made by *Clark* after its date. This deed was executed with *Clark's* knowledge; it was after its existence, that he executed the note with *Gomez*, as co-surety for *Levy*. For so doing, he cannot be indemnified by the mortgage, and of course can communicate to *Gomez* no right arising from the same instrument. For these reasons, I think the bill should be dismissed.

PER CURIAM.—Let the bill be dismissed with costs.

Christian L. Benzein, et al.
v.
William Lenoir, et al. } From

A trust being an incident of the legal estate in the land, is of necessity destroyed or suspended by whatever destroys or suspends the legal estate. Therefore, the lord by escheat, the abator, intruder, disseisor, &c. are not subject to a trust.

Where a grant is obtained, with knowledge of the fact that the land has been before granted, such grant is void, and will be vacated in equity. Where this state of facts appears, the Court will act, although the party entitled to relief is made Defendant with the fraudulent grantee—especially where the bill was filed many years ago, when our equity system was imperfect, and the practice little understood.

Where such fraudulent grant has been recently obtained, the Court will entertain a bill to vacate, upon the ground of *quia timet*; *a fortiori*, where possession has been had under it so as to bar or cloud the title at law, and will not only vacate the grant, but direct a re-conveyance.

It is no defence that the fraud was not intended for the person upon whom it has taken effect; for if fraud exists, the party practising it shall not be protected against any who are injured.

An equity of redemption is not a trust, but is a right inherent in the land, and charges all who take the land, although coming in in the post and by title paramount.

The doctrine laid down in *Campbell* v. *Macarthur*, (*N. C. T. R.* 115,) recognized as law.

This cause, which has in its various stages been frequently before the Court, (*vide Conference Reports*, 217. 1 *Law Rep.* 504,) was argued at last term, upon the order for rehearing, made by BADGER, Judge, on the Autumn Circuit of 1824, (4 *Hawks* 403.)

The bill was filed before the year 1800, and subsequently amended; from the length of time which has elapsed since the commencement of the suit, many changes have taken place in the parties, which it is unnecessary to notice, as the cause turned solely upon the questions presented by the original and amended bill. It was filed by the Plaintiffs, styling themselves "members of

JUNE, 1828.

Benzein v. Lenoir et al.

the *Unitas Fratrum*, on behalf of themselves and all the other members of the said *Unitas Fratrum*." They averred, that on the 12th day of November, A. D. 1754, *Earl Granville* granted to *Henry Cossart*, agent of and trustee for the *Unitas Fratrum*, two tracts of land in Wilkes county; that *Henry Cossart* died before the 4th day of July, A. D. 1776, leaving *Christian Frederick Cossart*, of the kingdom of Great-Britain, his heir at law. That *Christian F. Cossart*, with a view to a sale of the said land, in the year 1772 appointed one *Frederick William Marshall* his attorney, with a power of substitution.—That *Frederick W. Marshall*, in pursuance of this power, appointed *John Michael Graff* his substitute, who on the 22d day of July, A. D. 1778, sold the said lands to one *Hugh Montgomery* now deceased, for 6,250 dollars; that *Montgomery* paid 2,500 dollars of the purchase money, and on the next day, July 23d, for the purpose of securing the balance, demised the lands to *Graff* for the term of five hundred years, with a proviso for redemption; that *Graff* the mortgagee held the legal title of the term in trust for the *Unitas Fratrum*, and upon his death it vested in *Fragott Bagge* his administrator, who well knowing the trusts upon which his intestate held the same, assigned it to *Frederick William Marshall*, the agent of and trustee for the *Unitas Fratrum*, who by his will dated December, A. D. 1801, devised it to the Plaintiff *Benzein*, who was also one of his executors, by whom the will was proved in this state. That in all the above recited transactions, *Henry Cossart*, *Christian F. Cossart*, *Frederick W. Marshall* and *John M. Graff*, admitted themselves to be trustees for the *Unitas Fratrum*, an ancient Episcopal Church, recognized as such by an act of Parliament, 22d *Geo.* 2, and that the name of *Henry Cossart* was used for no other reason, but because the legal title to the land was supposed to be vested in him, and that *Montgomery* in his will recognized the balance of the purchase money for the said land as a debt due by

him to the *Unitas Fratrum*, and charged his residuary estate with the payment of it. That *Montgomery* in his life time conveyed the said lands to several persons, of whom *John Brown* was the only survivor, in trust for his two infant children, that he appointed the same persons executors of his will, and that he in his life time, and his executors and trustees since his death, had held possession of a part of the said land. The bill then averred that the Defendant *Lenoir*, and other persons claiming under him, who were also Defendants, pretending that the land was subject to entry, had obtained grants for part of it.

The Plaintiffs insisted that the grants, if any had been obtained, issued since the year 1777, and were not warranted by any law for opening the land-office. That if the land had been entered as confiscated, the grants were void and inoperative, and if they were not void, that the state held the land if it had been confiscated, as a trust to secure the debt due to the *Unitas Fratrum*, and that it was still subject to this trust in the hands of the Defendants, who they averred had notice of it at the time they obtained their grants. The Plaintiffs denied that the land was within the several confiscation acts, and in support of this position, relied upon the act of 1782, entitled "an act to vest in *Frederick William Marshall, Esq.* of Salem, in Surry County, the lands of the *Unitas Fratrum* in this state, for the use of the said *Unitas Fratrum* and other purposes." The bill also alleged that there were defects in some of the instruments of transfer from *Cossart* to *Montgomery*, and sought to have the same corrected.

The executors and trustees under *Montgomery's* will, as well as the persons who claimed under grants from the state, were made Defendants. The Plaintiffs prayed a discovery of the title claimed by the Defendants who were grantees, and that they might be decreed to be trustees for the infant children of *Montgomery*, and com-

June, 1823.

Benzein v. Lenoir et al.

pelled to convey their titles and deliver up possession to his surviving trustee, and that the Plaintiffs might have satisfaction of the debt due to the *Unitas Fratrum*.

John Brown, the surviving executor and trustee of *Montgomery*, in his answer, admitted all the allegations of the bill, stated that he had brought an action at law to recover possession of the land, in which he failed. He denied his obligation to pay interest on the mortgage debt, because he had never been put in possession, and submitted to pay the balance whenever this was done.

The Defendant *Lenoir*, in his answer, admitted that he had, on the 22d of May, A. D. 1779, the 24th day of September, of the same year, and on the 1st day of March, A. D. 1780, obtained four grants for land which was within the boundaries of the land mentioned in the bill; that these grants were founded on several occupancies, some of them as old as the year 1765. He averred that he had been in actual possession and occupation of all the lands included within his grants ever since their date, claiming the same, adverse to the title of any person whatsoever; and prayed the benefit of the act of 1715, entitled "an act concerning old titles of land, and for limitation of action, and for avoiding suits in law." He denied that *Henry Cossart* held the land mentioned in the bill in trust for the *Unitas Fratrum*, and insisted that he held for himself. He denied having any notice, before the date of his grants, of the title of *Cossart*, or of the trust claimed by the Plaintiffs to exist for the *Unitas Fratrum*, but admitted that before that time "he had heard that the Moravians set up some claim to two tracts of land, which were supposed to include the four several tracts herein mentioned as claimed by him, but it was nothing more than a vague report, often contradicted by persons who said they had asked the Moravians about it, and that they disclaimed having any title to them; but that he never had any information in the premises

to induce him to believe that the *Unitas Fratrum* had any just claims to the land mentioned in the bill."

There were twenty other Defendants. The titles of those who did not disclaim were, in all important particulars, similar to that of *Lenoir*. The grants they had obtained were all dated since the year 1754, and they admitted the same notice, and relied upon the same defence.

The deeds of *Lord Granville* to *Henry Cossart*, the power from *Christian F. Cossart* to *Frederick W. Marshall*, the deed of substitution from *Marshall* to *Graff*, the conveyance by *Graff* to *Montgomery*, and the mortgage made by the latter, the assignment by *Bagge* to *Marshall*, as well as his will and that of *Montgomery*, and a great variety of other documents were filed as exhibits to the bill. An abstract of those above mentioned only is thought to be material.

The deeds of the *Earl of Granville* to *Henry Cossart*, dated the 12th day of November, A. D. 1754, were indentures "made between the *Right Honorable John, Earl of Granville, &c.* and *Henry Cossart de St. Aubin, Agent of the Unitas Fratrum*. The limitation was "to the said *Henry Cossart*, his heirs and assigns forever." The covenants for the payment of the quit-rents were, that "the said *Henry Cossart de St. Aubin*, his heirs and assigns shall, &c." There was no declaration of trust for the *Unitas Fratrum*, neither was their name mentioned in the deeds, except in the manner above set forth. The return of the surveys, however, stated them to have been made "for the Lord Advocate, the Chancellor and Agent of the *Unitas Fratrum*." The power of attorney from *Christian F. Cossart* to *Frederick W. Marshall* recited, that "for the end, intent and purpose that all and singular the fee simple, inheritance and full property of all my messuages, lands, plantations and hereditaments now belonging to me the said *C. F. Cossart*, situate, lying and being in the province of North-Carolina, may be sold, &c. the said *F. W. Marshall*, of Salem, in Wacovia,

June, 1828.

Benzein v. Lenoir et al.

(the name of the Moravian settlement) in the said province of North-Carolina," was authorised to sell and dispose of the same, and he was directed "to remit and consign the proceeds to me, the said *C. F. Cossart*, or otherwise to my executors, administrators or assigns." No mention whatever was made in it of the *Unitas Fratrum*.

The substitution of *Graff* for *Marshall* followed the words of the original power, and in no way upon its face did it appear that *Graff* was the agent or trustee of the *Unitas Fratrum*, whose name was not inserted in the deed. The same was the case with respect to the deed made under this power by *Graff* to *Montgomery*, and of the reconveyance to *Graff* in mortgage, and the articles in execution of which the deed was delivered, recited that the land was the property of *C. F. Cossart*.

The assignment by *Bagge* to *Marshall* recited the power from *C. F. Cossart* to *Marshall*, the substitution of *Graff*, the sale to *Montgomery*, and the mortgage by the latter to *Graff*, but contained no allusion to the interest of the *Unitas Fratrum*.

F. W. Marshall, by his will, recited, that "whereas it is incumbent on me to see that sacred trust imposed in me by the people known by the name of the *Unitas Fratrum*, with respect to all the land which I have and hold for them, in the State of North-Carolina, settled and established, &c." The will then recited the conveyance by *Earl Granville*, on the 7th of August, A. D. 1753, of 98,985 acres of land, known as Wacovia, to *James Hutton*, Secretary of the *Unitas Fratrum*, and a declaration of the same date by *Hutton*, that he held the whole of the 98,985 acres of land in trust, for the use and benefit of the *Unitas Fratrum*, and declared the trusts upon which great quantities of land in Pennsylvania and New-Jersey, as well as in North-Carolina were held, and devised the whole thereof to the Plaintiff *Benzein*, in fee simple, in trust that the devisee and his heirs "would main-

tain the said United Brethren in possession of the said tracts and parcels of land." And as to the lands in dispute, the will declared that they were originally "conveyed by the late *Earl Granville* to *Henry Cossart*, Agent of the *Unitas Fratrum*, in trust for the same. The legal estate was afterwards by virtue of a power of attorney conveyed by me, or which is the same, by my attorney, *John M. Graff*, to *Hugh Montgomery*. And whereas the said *Hugh Montgomery* did mortgage the same lands to the said *John M. Graff*, for the balance of purchase money, and *Fragott Bagge*, administrator of the said *John M. Graff*, assigned the said mortgage to me, I do therefore hereby devise all my right, &c. in and to the said lands, to the said *Christian L. Benzein*, his heirs and assigns, in trust, as aforesaid."

Montgomery, by his will, which was proved in the year 1780, after several specific bequests, charged all the remainder of his estate with the payment of his debts, and "especially with a just debt in specie, which I owe to the Moravians at Salem, and I do in a particular manner, order and direct my said executors to satisfy and discharge such Moravian debt, in gold or silver, according to equity and good conscience, and for that purpose to sell and dispose of so much of my said residuary estate for gold or silver, as shall fully satisfy that debt."

Replications were taken to the several answers, but the Plaintiffs, by an instrument filed as an exhibit, admitted that the Defendants had been in possession of the land claimed by them, in the manner set forth in their answers.

The depositions filed were exceedingly voluminous. It is thought, however, that the case may be easily understood without an abstract of them.

A decree for the Plaintiffs was made in 1814, (*vide* 1 *Car. L. Repos.* 504,) and the object of the petition was to reverse that decree.

June, 1838.

Denacin v. Lenoir et al.

Badger, in support of the petition,—

I. No valid trust has been shewn.

1. The deed from *Ld. Granville* to *Henry Cossart* does not express any trust. In the premises the grantor is described as Lord President of the Privy Council, and Knight of the Garter, and the grantee is styled agent of the *Unitas Fratrum*. This description occurring in the premises whose proper office it is to specify the parties and the thing intended to be conveyed, cannot be supposed to intimate a trust, and in the *habendum*, where properly the uses and purposes of the conveyance as well as the quantity of estate conveyed ought to be declared, nothing is said of any trust; but the person having been in the premises sufficiently identified, even the term "agent" is omitted and the limitation is to "*Henry Cossart* and his heirs and assigns." To infer that the *Unitas Fratrum* were concerned in this grant because the grantee is styled their agent, seems not more reasonable than to suppose the Privy Council, or the Knights of the Garter had an interest in the grant, because the grantor is said to be a member of the latter, and the president of the former. The certificate of survey is certainly a very improbable place to find a declaration of the trusts of the grant.—That can only show for whom the survey was made, and if the survey was made for them, it is clear the land was not intended to be granted in trust for them. If *Cossart* took a grant to himself of land surveyed for them, he might on the ground of fraud be constructively a trustee, but no such fraud is alleged. The trust set up in the bill is a direct and proper trust, and is not supported by proof of facts, from which the Court, acting upon the conscience of the party, will by implication, raise a trust. The two species of trust are entirely distinct in their character, and governed by different rules, and the proof of the latter does not sustain an allegation of the former.

If such a trust as the Plaintiffs allege existed, and was recognized by *C. F. Cossart*, why does not an intimation

of it appear in the power of attorney to *Marshall*, in the instrument of substitution, in the deed to *Montgomery*, in the articles of sale, or in the deed which raises the mortgage term to *Graff*? In all these instruments, the land is treated as the property of *Cossart* alone, the sale is made for his benefit and the proceeds are directed to be remitted to him or to his assignees. Yet *Marshall* and *Graff* were members of the *Unitas Fratrum*, and *Bagge* the administrator of *Graff*, in his assignment to *Marshall*, takes no notice of the existence of any interest in the *Unitas Fratrum*.

June, 1828.

Benzein v. Lenoir et al.

2. If the deed does not express the trust, parol evidence is not admissible to shew it. The general doctrine that such evidence cannot be received to add to, or alter a written instrument, either at law or in equity, needs no authority for its support. No exception can be shown, which includes the present case, and the general rule is directly applicable to, and decisive of it. (*Roberts on Frauds*, 91—*Kirk v. Webb*, *Prec. ch.* 84.)

The act of 1782, lends no support to the Plaintiffs case. The purpose of that act, as declared in the preamble, was to vest in *Marshall*, the lands of the *Unitas Fratrum* in this state, and the second section vests in him the Wachovia and other tracts, but not that in question. The inference is that it was not their land.

3. The trust, if any, was void, because limited to an indefinite multitude.

In giving a construction to the statute 1 *Rich.* 3, which enables the *cestui que use* to convey the possession without the concurrence of his trustee, the distinction was settled between uses and trusts; the former being general and permanent, and the latter special or transitory. Where the seizin was transferred upon a confidence, that the feoffee would permit the feoffor, or any other person and his heirs to receive the rents and profits, and that the feoffee would make such legal estates as should be directed, this confidence was the use; but where the

June, 1838.

Dennis v. Lemoir et al.

transfer was to the intent that the feoffee should do some act which required him to have both the legal estate & the use, as to convey to a third person, this special confidence, was a personal trust in the feoffee. (*Sanders' Uses and Trusts, 3d London edition, ch. 1, sec. 1. 2.*) Upon this use the statute 1 *Rich. 3*, operated, enabling *cestui que use* to convey to a third person the legal estate, without the concurrence of the trustee, and upon this use, the statute of uses 27 *Hen. 8*, also operated by transferring to the *cestui que use* himself, the legal estate, without his own concurrence or that of his feoffee; but the special trust or confidence still remained unaffected by either of the statutes. The species of trust which is the creature of Courts of Equity, and introduced in consequence of the statute of 27 *Henry 8*, is but the secondary use, unexecuted by the statute. Whatever modifications modern trusts have undergone, they are in their origin and nature, nothing but uses upon which 27 *Henry 8*, does not operate. This trust, like the use before the statute, is a general and permanent right to the beneficial enjoyment as owner, of an estate of which another is seized at law. The use before, and this trust since the statute of uses, are, so far as this discussion is concerned, the same thing. (*Sand. U. & T. ch. 3, s. 1—Cruise Dig. Trust, ch. 1, s. 1, 2, 3.*)

It is said by *Ld. Keeper Henly* in the case of *Burgess* and *Wheate*, (1 *Blk. Rep.* 186,) "that uses and trusts are the same, seems adopted by all the great persons who have presided in this Court;" and in the same case *Ld. Mansfield* says, that "the forum where it is adjudged, is the only difference between trusts and legal estates, and whatever would be the rule of law if it were a legal estate, is applied in equity to a trust estate." Such also was the opinion of *Ld. Hardwicke*. (1 *Atk.* 591.)

In every limitation of uses, it was necessary there should be a person capable of taking the use, and those only were capable who could take the legal estate; hence a use to the parishioners of a particular place was

void. (*Sand.* 1 *ch. sec.* 9, *p.* 54, 55.) The rule is the same as to the capacity to take a trust estate. (*Sand. ch.* 3, *s.* 8.) But a legal estate limited to the *Unitas Fratrum*, would be clearly void—so would a use, and so, by the plainest & most precise analogy, would be a trust.

There is not the least reason to suppose that a trust for the inhabitants of a parish is good, otherwise than as a charitable use within the statute 43 *Eliz.* Mr. *Sanders* does indeed say, in the second edition of his work at page 67, that a use to a parish though void as a use, is good as a *trust*, but the case he cites, was decided upon the statute of *Eliz.* In the 3d edition, which was carefully revised by himself, the position is omitted, and the omission cannot be attributed to accident. He distinctly considers the question, who is capable of taking uses and trusts, as they existed before, and exist since the statute of 27 *Hen.* 8, and could only have left out the passage in question, because in a general sense he thought it untrue, and in its restricted reference to charitable uses, inapplicable to the subject of his treatise. The opinion of this writer is therefore with us, and no authority can be produced except the position laid down by him, and by him subsequently retracted.

It being clear, then, by both authority and analogical reasoning, that a vague trust is void, we are brought to the enquiry, whether the trust now in question is excepted from the operation of the rule as a charitable use. On this point I refer to the argument made at December Term last, upon *Griffin's* will,* only adding, that the case of the *Baptist Association* v. *Hart's Ex'r.* then cited, is a conclusive authority to show, that the trust here is void. There, the limitation was in trust for the "Baptist Association which for ordinary meets at Philadelphia," and is, to say the least, as certain as a trust for the *Unitas Fratrum*, a religious society whose members are scattered over Europe, America, and the remotest parts of the world.

* To be hereafter reported.

June, 1822.

Beaseley v. Lanoir et al.

But the act of Parliament recognising the *Unitas Fratrum* as an ancient Episcopal Church, has been, and may be relied upon, as giving them a capacity to take. It is not pretended that the act incorporates them, or expressly confers upon them any new faculties or powers, and the only question which can be made is, whether the bare recognition of an existing unincorporated society confers a capacity to take and hold property. It is evident it does not. The law of England recognises Counties and foreign States, yet they are incapable of taking any estate, legal or equitable. Parishes are recognised, yet we have seen that a use limited to a parish is void.—Churchwardens are officers whose existence is recognised, and their authority declared by many acts of Parliament; they are, to some purposes a corporation, have succession in law, can hold goods and chattels, and bring actions as churchwardens. (2 *Hen.* Bl. 559. 1 *Bl. Com.* 394. *Com. Dig. Eglise F.* 3.) Yet a devise of real estate to them is void. (*Wright* v. *Rew*—1 *Brown C. R.* 61 *in notes.*) For what reason? Because they are not a corporation as to lands. (*Com. Dig. Eglise, F.* 3.) Is the *Unitas Fratrum* on higher grounds than the Church of England itself? That Church, established, endowed and protected by law, has been recognised by innumerable acts of Parliament, from *Magna Charta* to the present day, and yet in its aggregate, the Church of England is incapable of taking any estate. (*Town of Pawlet* v. *Clark*—9 *Cranch*, 325, 326.)

But if recognition will confer corporate powers, why not the power of taking the legal estate? How is its efficacy limited to trust estates? The great purpose of incorporation, is to give succession in law to a body whose members by natural causes, are constantly changing. (1 *Bl. Com.* 494.) If such powers exist, in whom are they vested? Where is the succession, and in whom is the power to sue, to act, and to bind the whole body of the *Unitas Fratrum*? Is it in the members who reside in

Europe, in Asia or in America? If the trust in question is valid, the most arbitrary, capricious and indefinite limitations cannot be pronounced too vague for judicial support.

II. If there was a trust declared upon the legal estate of *H. Cossart*, and that trust was valid, then upon *Cossart's* death, before 1776, the legal estate descended upon his heir at law. It either remained in him, or was conveyed to *Montgomery*, and if so, there was a clear remedy at law, and consequently none in this Court; or the land vested in the State, by the effect of the Revolution, or the confiscation laws, and, if so, the State held exempt from the trust, and so granted to us, before the act of 1782.

1. Supposing the estate in *Cossart* or his assigns, there was a clear remedy at law, which subsisted at the filing of the bill, unless barred by legal impediments, and no argument can be required to show, that, in such case, equity cannot interfere. If this case is within any exception to the general rule, it ought to be shewn by our opponents. If defects in the instruments of transfer, be relied upon to give jurisdiction, we say, first, no such defect exists: secondly, if there be any, the estate is left in him who made the defective instrument, and he was competent to assert the right at law: thirdly, if such defect gives jurisdiction, it is only against the trustee, and those who represent him, in favor of those interested in having the estate transferred, and not against those who claim adversely to both; and lastly, if jurisdiction can be assumed against us, it can only be to supply the defect, in order to enable the party to proceed at law, and not for relief here upon a subject matter cognizable at law.

2. Supposing the legal title in the State, it was held discharged of the trust, as will appear from considering the nature of that interest.

To the very existence of a use, before the 27 *H.* 8, were necessary, a person capable of standing seized to

June 1678.

Bennett
v.
Lewis et al.

the use, privity of estate, and confidence of person—for a use was a trust or confidence, which was not issuing out of land, but was a thing collateral, annexed in privity to the *estate* and to the *person*. Hence it followed that whenever either of these essential requisites failed, the use, which could not subsist a moment without them, was, of necessity, either suspended or destroyed. For want of privity of *estate*, the lord by escheat, and the lord who entered for mortmain, held discharged of the use. So of the disseisor, abator or intruder, for they were in of a different estate. *(Sanders, ch. 1, sec. 9.)*

So where a tenant for life, remainder in fee to the use of another, makes a feoffment in fee, the feoffee, though he hath notice cannot stand seized to the *use*, for that is annexed to one *estate*, and he is in of another. *(1 Rep. 122 b. Sand. ch. 1. sec. 9, p. 53.)*

In like manner, where confidence in the person did not exist, though there was privity of estate, the use failed —as where feoffee to uses for valuable consideration, and without notice enfeoffed another. *(Ibid.)*

The king by reason of the dignity of his person, could not stand seised to a use, nor the queen, nor could a corporation—therefore, if lands were conveyed to the king and a subject for term of their lives to certain uses, such uses were void as to a moiety of the lands. *(Sand. ch. sec. 9, p. 53.)*

The reason of these cases is very evident, if we keep in mind that the use is annexed to an *estate*, and cannot be supposed to exist without it—is not an interest in the *land*, or issuing out of the *land*. That which depends upon the *estate* in the land must be destroyed by whatever destroys the estate; while that which attaches upon the land itself, cannot be affected by the destruction of the estate, on which it does not depend. This doctrine is stated, and the diversity well illustrated, in 1 *Reports*, 122 *b*.

To what purpose does a trust [illegible] a use, so that it can subsist after the destruction of the legal estate created to support it? The very definition of a trust shows that it is collateral, annexed in privity to the estate, and not issuing out of the land. (1 *Wms. Bl. R.* 160. *Cruise, Trust*, ch. 1, sec. 1, 2, 3. *Cond.* 214.) *Mr. Sanders* has indeed said, (p. 277,) that a trust will attach upon the land, but the case of *Maggridge* v. *Thackwell*, (2 *Eng. Ch. Rep.* 517,) which he cites, supports no such position. The case is a very simple one: a devise of personal estate to charitable uses, and the devisee dying in the life of the testator, it was held that the trust should not fail for want of a trustee. The subject of the devise was personalty, and therefore the case is not analogous to ours; but if it had been land, the decision does not affect a single position laid down in this argument. The estate of the testator was subsisting in his heir at law, and upon that estate a trust was declared. It is therefore highly probable the expression does not convey the meaning of the writer, and if it does, his own work sufficiently refutes it. If the trust attaches upon the land, it will charge even a purchaser without notice, and will follow the land into whatever hands it may come, like charges for equality of partition and other incumbrances; but the distinction between them is clear and decisive.—(1 *Rep.* 122 b.)

June, 1804.

Russell v. Lewis et al.

Mr. Sanders has also said that the King may be a trustee, (p. 278,) but the authorities he cites relate only to cases where the same estate on which the trust was declared, is vested in the King. In one of them (*Penn* v. *Baltimore*, 1 *Vesey*, 443,) the Duke of York who was trustee for *Penn*, afterwards ascended the throne, and the Chancellor inclined he might be a royal trustee, but gave no decided opinion—and even the inclination of his mind was produced by the special circumstances of the case. It is not intimated, that land vesting in the

June, 1828.

Denzein v. Lenoir et al.

King in his sovereign capacity, by title paramount, could be charged with a trust. Upon principle therefore, it must be held that whatever destroys the estate of the trustee, destroys the trust also.

In opposition to this reasoning, may be urged what is reported to have been said in *Geary* v. *Bearcroft*, (*Carter* 67) as stated by *Mr. Sanders*, (p. 278) "if a man conveys lands in trust, and the trustee commits felony, these lands shall be forfeited, though he may have relief in equity," to which *Sanders* subjoins, "it is the same if the trustee commit treason, for as *cestui que trust* forfeits his estate for treason, it is not consonant to justice, that the trustee should forfeit for the same offence." Now it is clear, that *cestui que trust* does not forfeit the trust estate for felony. (*Attorney Genl.* v. *Sands*, 2 Bro. in *Ch.* 6, 7—*Cruise, Trust ch.* 2, s. 27, 28,) and therefore the doctrine in *Carter* is not law; for forfeiture is annexed to the estate by the tenure, and if a conveyance to trustees will protect the estate from that consequence, both for the felony of trustee and *cestui que trust*, the lord may be deprived of his right, and estates disencumbered of an essential incident, by a mere contrivance of the tenant. The observation of the Master of the Rolls in *Eales* v. *England*, (*Prec. ch.* 200,) "that if the trustee die without heir, the lord by escheat will have the land at law, yet subject to the trust in equity," and the observation of *Ld. Mansfield* in *Burgess* v. *Wheate*, may also be urged against us. Now the point decided in the last case, is a complete answer to the dictum of the Master of the Rolls. It was there held, that upon the death of *cestui que trust* without heirs, the trust was expired, and did not escheat, and therefore that the trustee held discharged of the trust. If then the lord is subject to the trust, where the trustee dies without heirs, escheat is substantially destroyed, although by law incident to the tenure.

Should these observations be [illegible] upon, it is alleged for the Defendants,

1. That they are mere dicta, unsupported by authority, contradicting a plain analogy between uses and trusts, and subverting entirely the distinction between incumbrances which affect the *land*, and equities which affect the *owner* only. (*Cruise Escheat, sec.* 41.)

2. The observation in *Eales* v. *England* certainly, and the others probably, refer only to private persons, and do not apply to the sovereign taking *jure coronæ*. (*Cruise Escheat, sec.* 43).

3. Mr. Hargrave's decided opinion—he declares that Mr. Bridgman's own manuscript reports contain no such proposition as that stated in *Carter*, and considers the dictum in *Prec. Ch.* too loose to command any attention. (1 *Hargr. Exer.* 398—*Cruise Escheat, sec.* 43.)

4. The assertion of *Ld. Macclesfield*, that if a trustee of copyhold die without heir, the lord entitled by escheat is not subject to the trust. (1 *Strange* 454.)

5. The case of *Stevens* v. *Bailey*, (*Nels.* 107.) One contracted to sell, and before assurance made, died without heirs, on which the land escheated, and the Court held the lord not bound to complete the contract. After the sale, the vendor was a trustee for the vendee, and if the lord is subject to a trust in equity, he was bound to convey. (*Cruise Escheat, sec.* 44.)

6. The statutes 39 & 40, *Geo.* 3, *ch.* 88, *sec.* 12 & 47, *Geo.* 3, *ch.* 24, empowering the King to direct the execution of any trusts, to which escheated property might be liable, at the time of such escheat, and to make grants or leases for that purpose. For these statutes there could be no reason, if without them, the trust was a subsisting charge upon the lands in his hands, and he was bound to execute it.

7. The opinion of *Mr. Cruise* that the law is with us, and is as considered. (*Digest, Trust ch.* 2, *s.* 4—*Escheat sec.* 39 *to* 45, *inclusive.*)

In the state. Each [illegible] either *per defectum sanguinis* or *per delictum tenentis*, and the reason of an escheat in every instance, is the same, viz. the want of a tenant to perform the services. (*Cruise Escheat*, sec. 11, 16.) Wherever there is none to inherit, the land must revert to the lord, because the estate of the tenant is extinguished. Upon the whole, it is believed to be fully established that the trust being annexed to the estate, and not to the land, does not follow the land, but expires with the estate on which it depends, as every incident does with its principal, and as the state did not hold under the trustee, but paramount and in another right, the land discharged of the trust.

The former decree declares, that we are not competent to move these questions with the Plaintiff—that whether there was a trust or not, is a matter to us of no consequence, and concerns only the *Unitas Fratrum* and those deriving title *from Cossart*. Now who are the Plaintiffs here? The *Unitas Fratrum* alone. What interest do they claim in the subject matter of the suit? None except as *cestui que trusts*. Lay aside the trust, and they have no more right to institute this suit, than any other man, or society of men in the world; and surely may say with confidence, if there be no trust, they have no pretence to move any question at all respecting the land, either with us or any one else. The decree, does then in effect, affirm that a Defendant has no right to question the only interest set up by the Plaintiff, in the subject matter of the suit. Can such a proposition be maintained? Can a suit be properly constituted and judicially determined without any Plaintiff, or what is the same thing, by a Plaintiff who officiously exhibits a bill in which he has no interest, against *all* of those who have the interest?

III. If all these points are against us, we are protected by the statute of limitations.

We had more than seven years possession, and under [illegible] a grant which in color of title [illegible] claim and pos- [illegible] Plaintiff and to Gaskart.

The legal title whether in Gaskart's heirs at law, in *Montgomery*, or in *Graff*, could have been asserted at law, and not being asserted, was barred by our color and possession. For reasons unanswerably strong, it has been decided in this Court, that notice makes no difference in the operation of the statute. (*Griffith v. Legget*, 2 *Murph.* 210.)

The former decree seems to exempt this case from the operation of the statute, because of the trust, and our privities with *Intire*, by which we became trustees, and cannot avail ourselves of the possession against the Plaintiffs. The decree forbids us to dispute the existence of the trust, on the ground that it is immaterial to us whether it exists or not, and assumes its existence as the ground on which we are deprived of a defence, otherwise available for us.

But assuming the trust to exist, is not the reasoning of the Court entirely fallacious? Trusts, as has already been shown, are annexed to estates in the land, and not to the land itself—and those only are constructively trustees who take from the trustee, either with notice or without value, the estate on which the trust depended. Can an instance be produced, where one who entered upon land adversely to the trustee, was held to be a trustee, while the estate of the trustee was subsisting and capable of being enforced? It may be confidently affirmed that no such case exists. The only principle on which the alienee from the trustee is charged with the trust, (as well as the nature of trusts,) shows that it can have no application to a case of title, claimed adversely to the estate of the trustee. Notice is perfectly immaterial on this subject in equity, as well as at law. (18 *Ves.* 94, 98, 100.)

June, 1838.

Benson v. Lewis et al.

But if it could be maintained, that we were constructively trustees for the Plaintiffs, still they are barred for the reasons given by *Sir William Grant*, in his admirable judgment upon the Jamaica Statutes. (*Beckford v. Wade*, 17 *Ves.* 87.)

If we were not trustees for the Plaintiffs, while the legal estate of *Cossart* existed, and was capable of being enforced, did we become such because that legal estate was barred by the statute of limitations? Manifestly we did not; for whatever bars or excludes the legal estate of the trustee, of necessity destroys the trust—so that after that estate is gone, there remains no trust for which any one can be seised. The cases already referred to of escheats, &c. are full to establish this position. But the same doctrine has been decisively settled by many decisions in direct reference to the effect of the statute of limitations. (*Wyche v. E. I. Company*, 3 *P. Wms.* 309.—*Lowly v. Lowly*, 2 *Mod.* 32.—*Chalmondely v. Clinton*, 2 *Merivale*, 362.—7 *Johns. C. R.* 115.—6 *Vesey* 217.) And the cases referred to have been sanctioned in a recent case by *Lord Manners*. (*Pentland v. Stokes*, 1 *Ball and Beatty*, 74.)

A contrary doctrine would produce ruinous consequences, and would subvert the safe and salutary principle on which this Court decided the case of *Reddick v. Leggett*. That decision, instead of having the effect to quiet titles to land, will only convert him who had seven years possession, with a colorable title into a trustee, and, instead of giving him protection, will merely change the jurisdiction in which a recovery is to be effected against him.

The case was argued by *Gaston*, for the Plaintiffs at length. (The Reporter regrets that the arrangements made by him to present the argument of this gentleman to the profession, have wholly failed; he is compelled, therefore, to ask that it may be inferred from the reply of *Mr. Badger*.)

Jones, 1828.

Bennett & Lewis et al.

Badger in reply:—

Is the parol evidence admissable to shew the trust?

The rule at the common law upon the subject of parol evidence, to vary or add to written agreements, was very strict, and an attentive examination of the citations from Roberts on the Statute of Frauds, will show that independently of that statute, the evidence is not admissable to prove the trust set up by the Plaintiff. (*Roberts*, 9, 10, 11.—*Hampshire* v. *Pierce*, 2 *Ves. sen.* 216, 1 *Ves. jr.* 241.—*Ld. Cheyney's case*, 5 *Rep.* 68.)

The reason why at common law, a use (as to lands) might be declared by parol, was, that the estate passed, not by force of a deed, but by livery of seisin: but wherever, at common law, a deed was necessary to affect the transfer, a deed was also necessary to raise the use. (*Roberts*, 91, 92, 93.)

Resulting trusts are expressly excepted out of the Statute of Frauds. There are two cases of resulting trusts, and one of them is where the deed is made to one, and the purchase money paid by another. (*Per Lord Rosslyn*, 2 *Vesey*, 150.) How is the state of facts from which the trust results, to be shewn? We say, by writing—certainly not by mere declarations depending for proof on oral testimony. (*Roberts*, 94, 95.—*Kirk* v. *Webb*, *Prec. Ch.* 84.—*Newton* v. *Preston*, *ibid.* 103.)

That the exclusion of parol evidence to shew the declaration of a trust, is not derived from the Statute of Frauds, is evident from the case of personal property, to which that statute does not apply. Where a written transfer or grant is made, a trust cannot be set up by oral testimony; because, though the case is not within the statute, yet the general principle of law excludes such testimony, where there is a written instrument. (*Roberts*, 94.—*Fordyce* v. *Willis*, 3 *Bro. C. C.* 577.) In Mr. Eden's note on *Fordyce* v. *Willis*, he says, he has "not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."

The conclusion from all the cases will be found to support these positions: where to the creation of the legal estate, a writing is necessary, as it is also to declare the trust; where a written transfer is not necessary, yet if it exist, a trust cannot be superadded by parol; and that independently of the statute altogether, a trust cannot be averred, except where, before the statute of uses, a use could be averred, which could not be proven there was a declaration of the use, a feoffment or bargain and sale.

The utmost relaxation of the rule is found in the case of *Streeter* v. *Jones*, decided in this Court, that *facts and circumstances* may be shewn; and even from that decision, the Chief-Justice dissented. (2 *Hawks*, 435.)

As to the validity of the trust.

The ordinance of the Convention of 1778, was intended, not to give validity to gifts previously invalid, but only to secure from legislative interference, such property as had been well granted before. And the position cited from *Bacon's* Abridgment, that "a use to the poor of the parish of Dale is good as a trust," is the very proposition laid down by *Sanders*, which has been already considered, and does not require to be further discussed. It is very evident that this trust can only be supported as a charitable use, under the statute of 43d *Elizabeth*. The subject of charitable uses, so fully examined in *Bryan* v. *Graham*,* I consider as forbidden ground; but, admitting every thing that was demanded by the defendant's counsel in that case, to be law, it will not help the Plaintiffs here. For in the first place, that statute was intended to protect charities within the realm, but the *Unitas Fratrum*, considered as a religious society, maintain their charities throughout the world.—2d. Its protection extends to no body of which the Court has not the control. *Attorney General* v. *City of London*, and *William and Mary College*. (1 *Ves. jr.* 243. 3 *Bro. C. C.* 171, *S. C.*)

* To be hereafter reported.

But it has been objected, that the judgment on the demurrer (*Conf. R.* 217,) determines this question, and that the only mode of re-examining that decision, was by a petition to rehear the order. This is a clear mistake as to the practice in equity. After demurrer overruled, defendant may insist on the same objection by way of plea. (*Mitford*, 176.) So if a plea be overruled, defendant may by his answer insist on the same matter. (*Mitford*, 248.)

Did the State, supposing her to have taken by escheat or otherwise, hold subject to the trust?

The strict rule as to *uses* required in all cases privity of estate, and the only relaxation of that rule, as applied to trusts, is that wherever the same estate upon which the trust was declared or attempted to be declared, exists, any party having that estate, or any interest carved out of it, though by act of law, shall be in general charged with the trust. Instances of this relaxation are found in the case of tenant by courtesy; and in the two cases cited on the other side from *Ambler*, 552, and 1 *Brown*, *C. C.* 81, where manifestly the estate still subsisted. In our case, the estate on which the trust was declared, is entirely spent and gone; and the other side must show, in order to support this trust, that a trust is annexed to the land itself, in a strict and proper sense. This has been attempted, but it is conceived it has not been accomplished.

That the terms *land* and *estate* are frequently used to express the same idea by legal writers, is certainly true, and it is as certainly true that their signification is entirely dissimilar—the first denoting the subject, and the latter the interest which one has in that subject.

That *Mr. Sanders* uses the term *land* in the sense of *estate* in the passage cited, will be sufficiently clear by comparing pages 212, 277, 278, and will be manifest by examining page 214, in which he quotes from *Sir Matthew Hale* a clear statement of the diversity between an

(June, 1838.

Denzein v. Lenoir et al.

equity of redemption, as an ancient right inherent in the *land*, and a trust as affecting only the *estate*.

The same remark may be made of *Mr. Cruise's* use of the word land, in title *Trust, ch.* 1, *sec.* 89, 90, as will be seen by his observations in the three following sections. But in whatever sense he used the word, it is clear he did not mean, that the King taking by escheat, is liable to the trust, for that position he expressly disaffirms.—(*Escheat, sec.* 42 *to* 47.)

In *Burgess* v. *Wheate, Ld. Mansfield* as to the point decided, was opposed by a majority of the Judges who decided the cause. He held that the King could call upon the trustee to execute the trust in his favor, the *cestui que trust* having died without heirs; and this opinion he founded on the position that the trust was, in the consideration of a Court of Equity, the land. But the other Judges held that the trust was gone, and the trustee held discharged of any liability. This case proves that, in a strict sense, the trust is not either the *land* or the *estate*, or equivalent to either, for if it were why was not the King entitled by escheat?

It is said that the decision of *Sir W. Grant* in *Cholmondely* v. *Clinton*, has been reversed. It is true, but the position for which that case was cited, was fully supported and confirmed by his successor, as will be shewn in another part of this argument.

The citation from *Jacob and Walker's* Reports will be examined presently, and it will be seen that its true meaning is only, that in equity the *cestui que trust* is considered the owner of the estate, his interest being in nature of a seisin, and capable of an adverse possession, in nature of a disseisin at law.

It is believed then, that the ground taken in the opening argument is fortified by the examination given it on the other side. That a trust attaches on the *land* as distinguished from the *estate* therein, is supported by no authority, and countenanced only by occasional, hasty,

and inaccurate language, while both authority and analogy shew, that the trust as an incident of the estate, perishes with it.

Was there relief at law?

The Plaintiffs either come here on the footing of a trust upon the legal estate of *Cossart*, or as entitled to the mortgage term of *Graff*. As to the first, it has been shewn that if there was such trust, it was void, or if the land vested in the state, the trust ceased. As to *Graff's* mortgage, there is no proof that it was designed for the benefit of Plaintiffs, neither the mortgage nor the assignment shews it—and no document takes notice of such an interest but the will of *Marshall*, made in December, 1802, several years after the commencement of the suit. If it did appear, it is void, or if not, it is but a trust of the term of which *Bagge* had the legal title. And in either view, this Court cannot entertain a bill against us, who hold adversely to all the parties, and claim no estate under any of them. The Plaintiffs having no interest in the suit, cannot help the jurisdiction by making Defendants with us, those who have that interest. As to the latter, was there not clear remedy at law, if the legal title passed to *Montgomery?* Can they seek relief here *now*, because by their neglect, they are barred at law? Or if not barred, why come here at all?

Are we protected by the statute of limitations?

This is certainly the great question in the cause, and it is necessary to examine the argument so ably urged by the Counsel on the other side, with care and attention.

As a preliminary step in this part of the argument, we must enquire whether the land of *C. F. Cossart* vested in the state either by the confiscation acts, or by the effect of the revolution. In support of the latter, nothing is adduced, and it is directly contradicted by the decision in *Campbell* v. *McArthur*, (*N. C. T. R.* 115.)—Then as to the confiscation acts. That of November 1777, ch. 17, is the only one which can be supposed to

June, 1828.

Benezet v. Lenoir et al.

affect our case. *Cossart* was not within the operation of it; the preamble describes three classes of persons as within the view of the legislature, viz. those who had withdrawn themselves from the state, and become attached to the enemy, those who had withdrawn to foreign parts in order to avoid bearing part in the defence of the freedom of the state, and those who being out of the United States at the commencement of the war, had failed to "return." Within the two first classes, it cannot be pretended that *Cossart* is included—and the word "return" in the clause describing the last class, shews that none was intended but those who had been our own citizens, and ought to have joined their countrymen in the struggle for independence. The Legislature had no view to seize the property of native citizens of Great-Britain, who had never been resident here, and from whom we had no right to expect assistance, but to punish those who had withdrawn from, or kept away from their homes in order to assist the enemy, or unjustly to withhold their aid from us. The latter was a proper and laudable purpose, and the former would have been injurious and illiberal, and therefore, the latter is to be supposed the purpose of the Legislature. Besides, this is a highly penal statute, and is to be construed strictly.

But further, the act specifying neither the individuals nor the property, nothing was divested out of the owner, and nothing passed to the state till an office found, or something in nature of it. (*per* TAYLOR, J. *in Faris and Wife* v. *Simpson*, *Conf. Rep.* 178.) And this appears to have been the understanding of the Legislature, for by the act of Oct. 1779, c. 2, after reciting that many persons who came within the description of the previous confiscation laws, had failed to return, it is enacted that the estates of certain individuals, specially named, "shall be fully forfeited." The case of *Campbell and McArthur* expressly decides, that persons owning lands in North-Carolina, had a right to decline taking part in the con-

troversy, and to sell their lands to any citizen, and that when such sale was made, and the title passed to a citizen, it was not competent for the Legislature to divest it. But the sale to *Montgomery*, was made in July, 1778, when no seizure had been made which divested the estate, and consequently the land was not within the operation of the act of 1779. It is not to be presumed the Legislature intended to divest the title of a loyal citizen; but if they did intend it, they had not the power.

June 1828.

Benzein v. Lenoir et al.

If however, the land did pass to the state, the trust on the principles already stated was gone; but if as we suppose, the title passed to *Montgomery* as to the fee, and as to the term of 500 years was vested in *Graff*, are we not protected by the statute?

It is admitted by us that naked possession is not sufficient—then had we not color of title? We had a grant covering the premises and professing, and for any thing which appears upon its face, effectual to pass the title. Several reasons have been urged why this is not sufficient.

1. That the land was confiscated, and therefore the grant was not color of title. The position is denied, and if true, the conclusion does not follow. The act of 1779, *ch.* 5, *sec.* 12, declares all entries of confiscated land void, and hence the counsel concludes, that a grant for such land, will not operate as a colorable title. This reasoning is unsound, for the act establishing the land office, and prescribing what lands may be entered, expressly excepts lands which had been before granted by the King and the Lords proprietors; and further, the last section of the Bill of Rights, which declares the right of soil to be in the people, expressly saves the titles of those claiming under such former grants. There can be no doubt therefore, that an entry of previously granted lands is void, because the Legislature had not authorized it, and because a higher power than the Legislature had excepted such lands from the general right of soil, claimed for

June, 1838.

Dennis v. Lenoir et al.

the people. If then a grant of confiscated lands is not a color of title for the reasons urged, a *fortiori* a grant of appropriated lands, is not. But a grant of lands appropriated, though it passes no title, is yet color of title by the universal practice and assent of the profession, and the contrary no lawyer would, at this day, maintain.

But in order to ascertain what this objection is worth, let us see what is the nature of a color of title. It is, says this Court in *Tate's heirs* v. *Southard*, (3 *Hawks*, 119,) "a writing *upon the face professing* to pass title, but which does not, either from want of title in the maker, or from some defect in the instrument." Therefore a deed from baron and feme, without privy examination, is color. (2 *Hayw.* 235.) So a devise by one not entitled, although the statute of Wills gives the right to devise only to those who are seised, &c. (1 *Murph.* 413—2 *Hayw.* 9—*N. C. T. R.* 19.)

So an unregistered deed, though registration is essential to its operation, (2 *Hawks*, 33.)

So an unconstitutional act of assembly, though such act is absolutely void. (*Episcopal Church* v. *Newbern Academy*, 2 *Hawks*, 233.)

And so also, a deed executed in the name of A, as attorney of B, though without authority, (2 *Murph.* 14.) And even in one case, the officers of the state signed the grant, and affixed the [illegible] seal without authority, and it is difficult to conceive why this should not be color of title also.

The objection presupposes as its foundation, that the statute operates to perfect those titles which are partially defective only; but this is an entire mistake. The statute presupposes a party totally without title, and protects his possession because he *seems* to have one; the claim which a party sets up is, and generally must be entirely void, in order to the operation of the statute at all. (2 *Jac. & Wal.* 160.)

2. It is objected that the defendant had notice that the lands had been before granted. To this objection the case before cited of *Reddick* v. *Leggett*, and the second section of the statute itself, furnish a conclusive answer.

3. It is said our claim is based on fraud, and equity will therefore strip us of our legal defence. The only fraud which is charged, or can be pretended to be proved, is taking a grant of lands, with notice that another claimed them. That is of no avail to prevent the bar of a legal estate in a Court of Law, according to the case of *Reddick* v. *Leggett*, so often referred to; and if it furnish a ground for the interference of equity, the decision of that case does not protect the possessor, but only puts him to the expense and delay of a suit in equity, instead of the shorter and cheaper remedy at law.

It is surely a mistake to say that our statute operates directly on remedies only. If this be intended, it operates expressly and immediately upon the "title and claim," and the remedy ceases because the right is gone.

It seems then clear, that the legal estate was barred by the statute: and this brings us to the enquiry, if the equitable or trust estate was thereby destroyed.

No new cases are brought forward by the opposite Counsel, but he has endeavored to escape from the force of those cited in the opening argument.

It is said by the Counsel, that in *Pentland* v. *Stokes*, there were trustees to protect the inheritance; but can that circumstance have any effect upon the decision?—Every lawyer knows that in settlements, trustees to support the contingent remainders, are intended not to protect the estate from the acts of strangers, but to prevent the ulterior contingent limitations from failing, by the forfeiture of the previous life estates, before such limitations have become vested.

It is said that the opinion of *Sir William Grant*, in the case of *Cholmondely* v. *Clinton*, was overruled when the same case came before *Sir Thomas Plumer*, as reported in 2 *Jac. and Walker*.

June 1828.

Bentein v. Lemoir et al.

Let us examine that case and see if there was any difference of opinion between those two great Judges, upon the point to which I have cited it, and the only one material to this discussion.

The case will be sufficiently stated for the present purpose by saying, that the defendant entered into possession of certain mortgaged premises, claiming to be entitled to the equity of redemption, and with the assent of the mortgagee, received the profits for more than twenty years, after which the Plaintiff filed his bill, alleging that in truth, the estate subject to the mortgage was his, and praying an account and relief. The question whether the Plaintiff or Defendant was originally entitled, depended upon the construction of certain deeds of settlement; and at the hearing before *Sir William Grant*, that question was discussed, and it was also insisted by the Counsel for the Defendant, that whether the Defendant was originally entitled or not, yet he was then entitled, by the operation of the statute of limitations, which had barred the Plaintiff's right, and vested it in the Defendant.

The Judge was of opinion, that there could be no such thing as a disseisin of an equitable estate, while the legal estate subsisted; that a tortious act could not be the foundation of an equitable title, which might be barred by barring and excluding the estate of the trustee, but could never be transferred from one person to another. He therefore directed a case, to take the opinion of a Court of Law upon the construction and effect of the deeds of settlement, (2 *Mer. Rep.* 171.) When the cause came on for further directions, *Sir Thomas Plumer* had succeeded to the office of Master of the Rolls, and the case was again elaborately argued before him, (2 *Jacob and Walker's Rep.* 1.) His Honor was of opinion that the effect of the deeds was not material to the decision of the cause, for that admitting the title to have been originally in the Plaintiff, he was barred by the statute of limita-

tions, and the Defendant was then entitled, although the legal estate was subsisting in a person, whose title both the Plaintiff and the Defendant admitted. But the position laid down by *Sir William Grant*, "that by barring and excluding the legal estate, the equity was also destroyed," so far from being questioned, was distinctly admitted by the Counsel for the Defendant, (2 *Jacob and Walker, pages* 18, 51,) by the Counsel for the Plaintiff, (*page* 62,) and by *Sir Thomas Plumer*, (*vide pages* 146, 147, 148, 153, 154.) The real difference between these Judges was, that the former held that, to be the only mode of barring the equity, while the latter, admitting that to be one mode, insisted upon the existence of a separate independent bar of the equitable, without regard to the legal estate—by which, in analogy to a disseisin at law, the equity would be acquired by the possessor, and the trustee hold the legal for estate him, as he before held for the rightful owner of the equitable estate.

But it has been said by the Counsel on the other side, that *Montgomery* had only an equitable title, and that the statute operates only at law, and not upon equities; and *Jones* v. *Pierson* and *Falls* v. *Torrance* are cited.—These were cases of pure trust, but it cannot be pretended that we were more than trustees by implication. In relation to the latter, the statute even in England applies, and the reasons, founded in the peace and welfare of the community, are forcibly given by *Sir Thomas Plumer*. (2 *Jac. and Wal.* 139 *to* 149.) But our statute applies directly in its terms to the right, and bars it. The Jamaica statute, expounded by *Sir William Grant*, in *Beckford* v. *Wade*, is like our own, except that it contains an express exception of trusts. Yet *Sir William Grant* held that exception to be confined to direct trusts, and that the statute would operate in all cases of trusts by implication. His reasons for that opinion are worthy of profound attention, not only on account of the

June, 1828.

Benzein
vs
Lenoir et al.

source from whence they come, but also for their intrinsic value and excellence.

Two other grounds are insisted upon why the Court should disregard the bar of the statute.

1. It is said our title is founded in fraud—to which it would be a sufficient answer to say, that the statute operates upon the supposition that we have not a title—we rely upon the lapse of time, and not upon the title. But what is the fraud? Taking our grant with knowledge of Plaintiff's claim. Suppose it so—what follows? that we cannot use the statute to protect us? No—but we cannot use that title.

That fraud will vitiate every transaction is true; if a title be fraudulently procured, it is not a good title; and therefore cannot be supported as such—but it may appear *on its face* to be a good one, and if the party having title neglect to assert his claim, it becomes by lapse of time, what it was not at first, to wit, a good and valid title.

If we had by a fraudulent contrivance, prevented the Plaintiff from proceeding to assert his right at law, that I admit, upon a proper bill, might be ground to deprive us of the benefit of the statute. But no such case is made by the bill, or shown in proof.

The position that fraud in acquiring a title, will deprive the party of the benefit of the lapse of time, is directly contradicted by *Lord Kenyon*, in the case of *Bonney* v. *Redgard*. (1 *Cox*, 145.)

It was contended in *Cholmondely* v. *Clinton*, that a wrongful tortious act could not be the foundation of a right in equity, and hence would not be aided by the lapse of time; but *Sir Th. Plumer* held otherwise, and his decree was affirmed in the House of Lords. See also *Mr. Butler's* argument in that case, and the cases cited by him, from page 47 to 50. (2 *Jac. and Wal.*)

2. The difficulties of the Plaintiffs, the unsettled state of the country, and the prejudices against their claim, soon after the war of the Revolution, it is insisted, furnish an answer to the statute.

But in the case of *Cholmondely* v. *Clinton*, the Master of the Rolls held that neither poverty, ignorance, nor mistake will save a case from the bar of the statute.—(2 *Jac. and Wal.* 139.)

And in *Benyon* v. *Evelyn*, it is expressly decided, that though the Courts of Justice are closed so that a party cannot bring his action at all, still the statute will run against him, (*Bridgman's Rep.* 324,) and this case is cited with approbation in *Beckford* v. *Wade*, (17 *Ves.* 96.)

Lastly, it is urged that our grant is liable to be set aside and vacated on the ground of fraud, and hence it is not colour of title, and for this is cited *McCree* v. *Alexander*. To cite the case for this purpose, is making the Court say, what they expressly declare in that case they do not mean to say. But it is useless to prosecute this enquiry, because no case is made in the bill, or supported by the proof to raise the question.

Upon the whole, it is conceived that three points, at least, have been established—that the trust, if any, for the *Unitas Fratrum* was void; that if good, the legal title passed to *Montgomery*, and has been barred by the statute of limitations, and that of necessity the trust is gone with it, and that if title to the land vested in the state, she held discharged of the trust, and so granted to us; and it is submitted, as the result from these propositions, that the former decree was erroneous, and ought to be reversed.

HENDERSON, Judge.—I shall place this cause upon a single point—the defence set up under the statute of limitation, which depends upon the right of the Defendants to use in this Court, their grants from the state as colour of title. I consider it entirely unimportant to either party, whether the lands were granted to *Cossart* in trust for the *Unitas Fratrum*, and if so, whether the trust was valid. For if both propositions were decided in the affirmative, if *Cossart* has lost his estate, the *cestui que trusts* have lost theirs also—their interest being a

June, 1828.

Benzein v. Lenoir et al.

mere shadow of the legal estate, vanishes when that ceases to exist, that is, when a different one arises, or in the language of the law, where another comes in the *post* to an estate in the lands. I do not mean where the estate, to which the trusts were annexed, falls into other hands than those appointed by the creator of the trust to take it; as where the devisee in trust dies before the devisor, there the heir takes the estate subject to the trust. The law is the same as to tenants by the curtesy, tenant in dower, and the bargainee under a bargain and sale, who are said not to come in by the trustee, but by the law, *their estates* being the same with that of the trustee, and cast upon them by law, although not created by the act of the party. Nothing but the technical expressions, the *per* and the *post*, and not going beyond the letter of the maxim into the principle upon which it is founded, can for a moment sustain the idea, that those estates were detached from the trusts. But the lord who comes in by escheat above his tenant's estate, the abator, the intruder, the disseisor, who thereby acquire a new estate, are not affected by the trust; and if as against them the trustee loses the legal estate, the trusts immemediately vanish, as the shadow disappears when the substance is gone. The trusts remain dormant, until the legal estate is regained by the trustee, when they immediately spring up again. The Plaintiffs, or more properly those who claim *Cossart's* estate, cannot attach a trust upon the estate of the Defendants, through the medium of the state, upon the idea, that she, upon the alienage of *Cossart*, succeeded to his estate, subject to the Moravian trust if any existed; and that the lands were then granted, subject to the same trusts.—For in reality, *Cossart's* estate did not come to the state at all, neither by the revolution, nor by the confiscation acts, according to the principles adopted in the case of *Campbell* v. *McArthur*.

June, 1828.

Benzein v. Lenoir et al.

The Plaintiffs equity is to have the grants of the Defendant surrendered up, as fraudulently obtained, both as against the state, and against them. It is shown that long before the 4th of July, A. D. 1776, the lands in question, were granted by *Lord Granville*, the then proprietor, to *Cossart*; and that the Defendants with a *knowledge* of that fact, for rumor in this Court is knowledge, entered and obtained grants for them from the state, under our entry laws, as vacant and unappropriated lands, in violation of both the letter and the spirit of those laws. I say that rumor is knowledge in this Court, if the rumor turns out to be correct. For although in this case, as the Defendants say, there was but a report, a mere rumor that the Moravians claimed these lands, which some pretended to believe, but more disbelieved, this rumor was notice; it should have put them upon enquiry. And if the rumor turned out to be correct, and the lands had been granted, whether to the Moravians or to others it is unimportant, for the fact of their having been granted, and not the names of the grantees, rendered the conduct of the Defendants fraudulent, they must take the consequences. They cannot say, that they were innocent purchasers, who had paid their money.—They took upon themselves to determine as to the truth of the report. The report turns out to be true. Equity requires that they should abandon their designs, and their persisting in them, after the rumor was ascertained to be founded in fact, is conclusive, that had they thought their design would have succeeded, they would have made the attempt with a perfect knowledge of the fact. In fine, it was a game of hazard; they adventured, and have lost. The report turns out to be true; the lands have been granted, and they must take the consequences. But the Defendants say they were not granted to the Moravians, nor to any one in trust for them; that *Cossart* held to his own use and benefit; that if their design was fraudulent, it was against the Moravians, and not

June, 1836.

Benzein
v.
Lenoir et al.

against *Cossart*. It is no defence either in the civil or criminal code, that the blow was not designed to injure the person stricken, but another? neither is it in this Court. The Defendants stand therefore before this Court, as having obtained their grants upon suggestions which were not only untrue, but which they knew to be untrue; they ask to be permitted to retain them. Upon what principle shall this be permitted? For what purpose? They tell us now to connect them with a seven years possession, and thereby bar the recovery of the Plaintiffs under that very title of which they had notice when they obtained their grants, and to defeat which, by some indirect means, was their original object. If compelled to give evidence against themselves, this must be their answer; for without foreign aid, their deeds were worthless. The lands had been previously granted. The grantor had nothing in them. Besides, they were obtained from a grantor to whom fraud cannot be imputed, and if in dealings with such a grantor, any exist, the consequences must be borne by the grantee. It appears to me, that to refuse our interference would be to reward iniquity, not to redress a wrong.

It is to be observed that the State, *ex mero motu*, or at the instance of the party aggrieved, would have caused these grants to be surrendered up to be cancelled. When this bill was filed, a Court of Equity, by the well settled decisions of our Court, was the proper place to apply, for redress against a fraudulent grant. Judge *Haywood*, it is true, for some time struggled against this practice, contending that the proper redress was at law; but he ultimately yielded.

If *Earl Granville* had granted, or rather passed to *Cossart* an equitable title, and the lands had come to the State subject to the equity, and the State had made the grants to the Defendants with notice, as in this case, can there be a doubt but that this Court would have made the Defendants trustees for the Plaintiffs?—and where

is the difference? In reality there is none; it lies only in a name. In the one case they have the legal title—in the other the equitable. In the first case, they come into a Court of Equity, not for the legal title, but to protect it, to guard it from harm and injury, as if the boundaries are obscure, or the land-marks wearing out—Equity will relieve by establishing them, and that upon the bill of one having the legal title. So also if a fraudulent deed has been obtained from the grantor, or from a stranger, and there is a *probability* of annoyance to him having the legal title, Equity will relieve by compelling a surrender of the fraudulent deed—Equity will remove every thing that improperly clouds or obscures a legal title, one great object of the Court being to give repose; to quiet and remove all fears and apprehensions arising from the fraud or iniquity of others, with regard to property. All that is required to be shewn is, that the fears are not idle or imaginary, and that there is a probability of harm.

Had this bill been filed, calling for a surrender of these grants after the facts in relation to them had been established, and soon after they were issued, the only possible defence which could then have been set up, would have been that the Plaintiffs apprehensions were groundless; that the grants were perfectly harmless; for the Plaintiffs being the elder, and of course the better title, could not be affected by them. To this it might then be properly answered, as the event in this case has shown to be true, although the deeds are fraudulent and void, yet they may be used to our annoyance. In the first place, they cloud our title, and may injure us should we wish to sell. But worst of all, you may connect them with a seven years possession, and bar our estate. You may also, under cover of them, perplex us with a lawsuit for almost half a century. These are certainly not such idle fears, or imaginary injuries as would induce the Court to dismiss the bill, because the Plaintiff

June 1828.

Benzein
v.
Lenoir et al.

had not made out a case of impending harm. If these anticipated injuries would be a sufficient reason for sustaining the bill, if filed immediately after the grants were obtained, *a fortiori*, the reality is now sufficient ground for affording relief. The lapse of eight or ten year after our Courts were opened, before filing this bill, forms no defence, and more especially when in that short space of time, an attempt was made to obtain redress at law, and which failed, probably from the temper of the times, for I imagine that no title derived from *Cossart* would then have been recognized. I feel therefore satisfied, that this Court is bound to take from the Defendants their grants, and all benefits derived from them; that they should be detached from the possession. In my mind, the possession set up under them by the Defendants, tends to weaken their case, as to retaining the grants. It shows in glaring colours the impropriety of permitting them to be retained, and settles the question as to the right of this Court to interfere. I have used thoughout this opinion the terms *fraudulent, iniquitous, &c.*—I apply them in their legal sense only, not by any means intending to impute corruption or fraud in its ordinary acceptation to the Defendants; I use them for want of some milder terms.

I feel some difficulty in affirming the decree, on account of the place in which *Montgomery's* devisees stand before the Court. They unquestionably should have been Plaintiffs instead of Defendants; and it is difficult to conceive why they were not originally made Plaintiffs. It can be accounted for only from the ignorance of our Equity practitioners. But they are before the Court; consequently their interest is bound. Their rights were as fully contested by the other Defendants, as if they were Plaintiffs. I cannot perceive that any prejudice has arisen to any one of the parties on that account. I repeat again, that this Court does not take from the Defendants the benefit of their grants, because

the land had been before granted, but because in addition thereto, they knew that they had been granted. Their object was to deceive or defraud some one, if not at first, most certainly when they learnt that the lands had been granted. They then well knew, that all they acquired by their grants was taken fraudulently from some other person; and they cannot rightfully gain any thing by them, if they are in fraud of the rights of others.

JUNE, 1828.

Benzein v. Lenoir et al.

HALL, Judge.—It appears to me that the ground is tenable, that the devisees of *Montgomery*, have a right to redeem against the Defendants. In considering this question, no reliance is placed upon the trust supposed to be in the *Cestuis Fratrum*. I also admit that when a person comes in to an estate in the *post*, as the King by escheat, such estate is held free from a trust; but an equity of redemption is not such a *trust*.

In a Court of Chancery, an equity of redemption is defined by *Sir M. Hale*, to be an equitable right inherent in the land, binding all persons in the *post*, that is, persons coming in paramount to, and not under the title of the mortgagee. The lord of the mortgaged lands when he enters for an escheat, takes them, subject to the rights of the mortgagor. (1 *Powell on Mort.* 11, 337—*Hard.* 479.)

Lord Nottingham says an equity of redemption charges the land, and is not a trust. In a Court of Equity, the equity of redemption is the fee simple of the land, (*Ibid.* 338, 11.) If then the land escheated to the state, subject to *Montgomery's* rights as mortgagor, it was bound by those rights in the hands of the grantees of the state. If it be admitted, that if the land had escheated to the state and was then conveyed to the Defendants, and their estate was not a continuance of the estate of the mortgagee's, so as thereby to subject them to the equity of redemption, for the mortgagee's estate was at an end, and that the state held the lands as the lord by escheat was supposed to do before he granted them at all, viz. that he came in in the

June 1828.

Benzein v. Lenoir et al.

post, was in of another estate, and further if it be admitted that there was no privity between that and the estate of which the mortgagee was possessed; still he held them subject to the equity of redemption.

The same remarks are applicable to a case where the lands do not escheat, as where the King or the State seizes them without right, and grants them to another, the grantee comes in of a new estate, and holds in the *post*; no reason can be given why he should not hold them, subject to the equity of redemption, as well as if they had escheated, and had then been granted. The principle is laid down as a general one, that the mortgagor can redeem against all persons coming in in the *post*, and the King by escheat, is only put as an instance. The reason assigned is, that when the money is paid, the mortgagor is placed *in statu quo*, the land having been only pledged for the money.

If then the lands of the Defendants are subject to the equity of redemption, is that right barred by length of time? In England, the right of the mortgagee is barred by twenty years adverse possession, by the express provision of the statute of limitations. The right of the mortgagor is barred by the same length of time in analogy to it. Here the mortgagee is barred by seven years adverse possession, by the act of 1715, (*Revisal, chap.* 2.) The mortgagor is barred by no time in analogy to that act, but only by twenty years, in analogy to the rule of the English Chancery. On this point, I need make no remarks; I consider the question to be at rest. (*Falls* v. *Torrance*, 4 *Hawks*, 420.) It results then, that the mortgagee may be barred by seven years possession at law; the mortgagor has twenty years to redeem in equity.

It is admitted, that the interest of a *cestui que trust* is dependant on that of the trustee in ordinary cases of trust, and if the trustee is barred by length of time, the trust is lost. But an equity of redemption is an inherent right

in the land, and binds the lord, or the state by escheat, as well as their grantee. And if the mortgagor had twenty years to redeem against the mortgagee, no reason can be assigned (as it appears to me,) why he should not have twenty years to redeem against the lord, or the state or their grantee; because the escheat to the King or the State, and the grant by them to an individual, were acts over which the mortgagor had no control, and his rights on that account, ought not to be weakened.—Further, when it is said that the King holds escheated land subject to an equity of redemption, it is understood that he holds it in no manner more injurious to the mortgagor, than when it was held by the mortgagee; and that consequently the grantees of the state in this case take the land with the same burthen that existed, before it was granted to them. I therefore think in this case, that the right of the mortgagor is not barred by lapse of time.

But it has been argued, that the mortgagee might have asserted his right at law against the Defendants, by bringing a suit for the land. It is true we now know he might have done so, but the reasoning of the Judges in the case of *Bogard* v. *Singleton*, (*Martin* 58,) leaned to the position, that an alien to our constitution could not hold lands here; and this opinion was entertained by one of the most eminent lawyers of that day, (Judge *Johnston*) as appears by his opinion in the case of *Den ex dem. of Stringer* v. *Phillips*, (2 *Hay.* 158.) Indeed we see how fruitless the suit turned out to be, that was brought by *Montgomery's* trustee. If a suit has not been brought by the mortgagee, the rights of the mortgagor are not to be injured on that account. It is not the case of a trust, which may be lost by the loss of the legal title; but it is the case of an equity of redemption, inherent in the land, where a bill will be sustained against any person, if brought within twenty years.

June, 1828.

Benezin v. Lanoir et al.

An objection presents itself in this case to the form of proceeding. The devisees of *Montgomery* are not Plaintiffs, which they certainly ought to be, in the view I have taken of it: because it is principally for their benefit that a decree is sought against the Defendants. But to say the least of this suit, it is an extraordinary one; at least, so far as relates to the time it has been depending. It appears, that a suit at law was brought in Morganton Superior Court sometime after the Revolutionary war, in which a nonsuit was entered in the year 1789. The present suit was commenced in the year 1793, not many years after a Court of Equity was first established in this State, after the Revolutionary war. At that time, there were doubtless but few of the profession who were well acquainted with Equity practice. The case has been brought to this Court several times, and partially argued. This is the second time it has been argued on its merits. It has been argued at great length, and the Counsel for the Plaintiffs at each argument have taken the ground that the trust of the *Unitas Fratrum* ought to be enforced. And in that view of the case, there cannot be the same objection to parties; because *Benezin* not only represents the mortgagee, but also the interests of the *Unitas Fratrum*. And admitting his pretensions to be well founded in the latter character, the devisees of the mortgagor are properly made Defendants. This is not the case, however, in the view I take of it. Under all these circumstances, if a decree can be made which will reach the justice of the case, it ought to be done. The parties are all before the Court. It is the interest of the mortgagor and mortgagee, as well as their wish, that a decree should be made. The case comes as fairly before the Court, and the interests of all parties can be as well consulted, as if the devisees of *Montgomery* were Plaintiffs. The mortgagee as such, and not as representing the *Unitas Fratrum*, prays for a decree, and he is interested in doing so. It is proper on his account,

that the mortgagor should be put in possession of the land, and receive the profits, otherwise he objects to the payment of the purchase money due to *Cossart*.

June, 1828.

Benbin v. Lenoir et al.

This view of the case steers clear of any injury to the Defendants, because if they are answerable to the devisees of the mortgagor in case they were Plaintiffs, they cannot be injured or placed in a worse situation, in case a decree is made against them on the same principles, in the present suit.

I hope and think that this case cannot, and will not be drawn into precedent, unless in cases marked with the same circumstances of delay and embarrassment, to which it has been subjected. Further delay would breed further litigation, and be productive of no good to either party. My opinion therefore is, that a decree should be entered for the Plaintiffs, or rather that the former decree be affirmed.

Per Curiam.—Let the petition be dismissed with costs.